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FREDERICK ALLIS

ATTORNEY & COUNSELLOR AT LAW

NO 1 BROADWAY NEW YORK

MODERN REPORTS,

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

KING'S BENCH,

CHANCERY, COMMON PLEAS,

AND

EXCHEQUER.

VOLUME THE TENTH;

CONTAINING,

CASES in LAW AND EQUITY, chiefly during the Time the late EARL OF MACCLESFIELD presided in the Courts of KING'S BENCH and CHANCERY, *viz.* from the Eighth Year of QUEEN ANNE to the Eleventh Year of KING GEORGE THE FIRST inclusive.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

LONDON:

PRINTED FOR G. G. AND J. ROBINSON; E. AND R. BROOKE; J. BUTTERWORTH; OGILVY AND SPEARE; AND L. WHITE, DUBLIN.

1795.

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THE

PREFACE.

THE following Papers were, at firſt, only deſigned for private uſe; but as the Author (*a*) has, for ſeveral years laſt paſt, been ſettled in a remote part of the kingdom, he thought he could not employ ſome leiſure-hours more ſerviceably to his Country than in publiſhing the beſt part of his Notes for the public benefit.

The Reader will no doubt obſerve, that they conſiſt of a variety of remarkable Caſes, few of which are to be found extant in other REPORTS.

The Author can with great aſſurance acquaint the Reader, that in every-thing here publiſhed he has given him the ſenſe, though not the words, of both the BAR and the BENCH.

(*a*) ROBERT LUCAS, Eſq. of the *Inner-Temple*.

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TRINITY TERM,

The Eighth of Queen Anne,

IN

The Year

1710,

IN

The Court of Chancery.

WILLIAM, *Lord* COWPER, *Chancellor.*
Sir John Trevor, *Knt. Maſter of the Rolls.*

---

* Earl of Bath *againſt* Sherwin.

Caſe 1.

The court of chancery may grant *a perpetual injunction*, after five trials at bar on the ſame point, and verdicts the ſame way.

S. C. Prec. Ch. 261 S. C. 2. Eq. Ab. 171. 243. S. C. 1, Bro. P. C. 266. S. C. 4. Viner, 426. S. C. 14. Viner, 431. Gilb. Rep. Eq. 2, Salk. 255, Stra. 554. 681. 1152. 2. Bl. Rep. 1180. 1704.

THE CASE before the Court was thus: A vexatious perſon having tried his right in an *ejectment* at law five ſeveral times, the court of chancery was moved for a *perpetual injunction* to ſtop all further proceedings at law (*a*).

COWPER, *Lord Chancellor*, was of opinion that it could not be granted. The juriſdiction of the court of chancery is generally divided into three parts; fraud, truſt, and accident. It is plain that the Court has not a power to do what is deſired in virtue of the two firſt branches of its juriſdiction; nor can it, I think, under the laſt; for by accident is meant when a caſe is diſtinguiſhed from others

(*a*) The ſingle queſtion on all theſe five trials at bar was, Whether *Chriſtopher Duke of Albemarle* was or was not the lawful ſon and heir of *George Duke of Albemarle*? Notwithſtanding the uniform event of theſe five trials in favour of *Duke Chriſtopher*, other declarations in ejectment were delivered; whereupon this bill was exhibited in chancery, praying that all queſtions touching the legitimacy of *Duke Chriſtopher*, or concerning his being the ſon and heir of *Duke George*, might be quieted and extinguiſhed, and to that end that a *perpetual injunction* might be awarded, to ſtay all further proceedings at law upon the ſaid pretended title, &c. S. C. 1. Brown, P. C. 268.

EARL OF BATH *againſt* SHERWIN.

of the like nature by unuſual circumſtances. For the court of chancery cannot controul the maxims of the common law, becauſe of general inconveniencies; but only when the obſervation of a rule is attended with ſome unuſual and particular circumſtance which

*[2] creates a perſonal and particular inconvenience. * This now is the caſe before the Court; for it is a known maxim of the common law, that a man may try his title as often as he pleaſes in an ejectment. Now for this Court to determine that one, two, three, or more unſucceſsful trials by ejectment ſhall be peremptory, *quid aliud* than to aſſume a legiſlative power, and alter the maxims of the common law? But, FIRST, it may be objected, that this is ſometimes done; for is not the penalty of a bond due by law, in caſe of non-payment of the money upon the day? and yet this Court decrees not only upon extraordinary caſes, where the payment of the money at the time appointed, by reaſon of ſome accident or misfortune, is become difficult, or impoſſible, but even in all caſes, where the obligor might have complied with the condition, that the penalty is not forfeited. But to this it may be anſwered, that the Court in this conduct is ſure of doing juſtice with an unerring hand, and in all events; for the Court never ſaves the obligor from the penalty of the bond, before he has made a full ſatisfaction to the obligee, both in reſpect to the principal, intereſt, and coſts. But now ſhould the Court decree, that two, three, or more unſucceſsful trials by ejectment ſhall be peremptory, the Court would be very far from doing juſtice in all events: for proceedings at common law are tied up to very ſtrict rules, and a man who has a very good title may be caſt through ſome ſlip in the proceedings, or a man may have better evidence at one time than another. Beſides, as often as the plaintiff loſes in an ejectment, the Court gives coſts, which is by law intended as a recompence; and though where fees are liberally given, it does not near come up to it, yet if things were managed more frugally, it

[3] would come much nearer.— SECONDLY, It may be objected, that where the court of chancery directs two trials by ejectment, and the plaintiff is caſt in both, this is peremptory; and what difference is there between trials at common law by ejectment directed out of chancery, and thoſe not directed? But where trials are directed by this Court, the Court has a previous knowledge of the evidence, and ſo the Court can the better judge. Certainly it does not follow, that becauſe in trials relating to cauſes originally belonging to the juriſdiction of this Court, and which are directed to be tried at law by this Court, the Court in theſe caſes determines how many trials ſhall be peremptory; therefore this Court may grant a perpetual injunction to proceedings at law, in matters triable at law and not in equity, and that only for doing what the law allows. But after all, the very ground of this objection fails; for even in caſes of ejectments directed by this Court, two unſucceſsful trials are not ſo peremptory, but that upon good cauſe another may be granted, which ſtrengthens the reaſon of the common law.—THIRDLY, It may be ſaid, that *boni eſt judicis*

judicis ampliare legem. But this maxim is not to be underſtood as that a Judge in equity ſhould alter the maxims of the common law, for this would be to aſſume a power paramount to the law. The utmoſt that can be meant by this maxim, if it has any meaning in it, is, that this Court, provided it has the law to juſtify it, ſhould ſometimes uſurp upon the juriſdiction of the courts at law (*a*). If this Court ſhould extend its juriſdiction in this point, it might by parity of reaſon extend it in other points, *viz.* determine how often diſtreſſes ſhall be taken. A collateral warranty was certainly one of the harſheſt and moſt cruel points of the common * law, becauſe there was not ſo much as an intended recompence, yet I do not find that this Court ever gave relief in it. If I had been inclined to enlarge the juriſdiction of the Court, I think it would be extremely difficult to fix any ſtanding rule in this caſe (*b*).

* [4]

(*a*) See Lord Mansfield's opinion of the meaning of this maxim, 3. Burr. 301. 304.

(*b*) The bill praying the perpetual injunction was accordingly diſmiſſed, S. C. Prec. Chan. 261. S. C. 4. Viner Abr. 426. But the plaintiff appealed from this decree to THE HOUSE OF LORDS, and after hearing Counſel it was ORDERED and ADJUDGED, that the decree of diſmiſſion complained of ſhould be reverſed, and that the court of chancery ſhould forthwith iſſue a *perpetual injunction* to ſtay the proceedings at law. S. C. 1. Brown Caſ. Parl. 270.

TRINITY TERM,

The Eighth of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.*
Sir Henry Gould, *Knt.*
} *Juſtices.*

Sir James Mountague, *Knt. Attorney General.*
Sir Simon Harcourt, *Knt. Solicitor General.*

The Caſe of Andrew Artemonowitz Mattueof, Ambaſſador of Muſcovy.

Caſe 2.

THE QUESTION was, Whether AN AMBASSADOR could by law be arreſted for debt.

SIR JAMES MOUNTAGUE, *Attorney General.* He cannot. If the privileges of an ambaſſador may by law be broken in upon and invaded for the preſervation of the property of a private ſubject, princes will be cautious of ſending ambaſſadors to us; ours muſt expect the like treatment; and few will be prevailed with to take that character upon them. Should an ambaſſador be liable to the reſtraints of the law of the land to which he goes, how eaſy would it be, upon an emergency, to take off his attendance upon his maſter's buſineſs? Does the law of *England* privilege the body of a *member of parliament*, and of a *ſoldier*, and ſhall it not that of an *ambaſſador?* The perſon of an ambaſſador has ever been held ſacred and inviolable, by the law of nations. The goods of an ambaſſador are not liable to diſtreſs, *à fortiori*, not his perſon. An ambaſſador muſt be intreated, and upon refuſal ſent back to his maſter. If an ambaſſador commit a crime of a tranſcendant nature, the king *a quo, non ad quem*, muſt

By the law of nations, neither an ambaſſador, nor any of his train or *comites*, can be proſecuted for any debt or contract in the courts of that kingdom wherein he is ſent to reſide.

Puffendorf bk. 8. c. 9. ſ. 5. Bynker. c. 17, 18, 19. 1. Roll Rep. 175 185. 3. Bulſt. 27. 4. Inſt. 153. Foſter, 188. 1. Bl. Com. 255. Stra. 797. Fitzg. 200.

THE CASE OF ANDREW ARTEMONOWITZ MATTUEOF, AMBASSADOR OF MUSCOVY.

* [5]

punish him. LORD COKE says, *legatos violari contra jus gentium*; nor does he add, as certainly he would, had he thought so, that though this be so in the civil law, it is not so in ours. * An ambassador does by fiction of law represent the person of his master: Thus COKE, upon the statute 25. *Edw.* 3. c. 2. affirms, that it is high treason at the common law to kill an ambassador. Now certainly nobody will say THE CZAR himself might have been arrested. The same fiction of law that makes him represent the person of his master, makes him *extraparochial*, and *quasi* in the dominions of his master. The ill treatment of ambassadors is a thing of dangerous consequence, for it may involve the nation in a war, and it would be very inconvenient that this should be in the power of any private person whatsoever.

CONTRA, *it was said*, If this be so, a subject may be left without remedy for the recovery of his debt, which would be a defect in law. Justice ought always to be reciprocal, but an ambassador may arrest, *ergo*, &c. It is a maxim in law, that the royal prerogative does no wrong, and shall the prerogative of an ambassador surmount that of the crown? Such a law as this would be a nullity, because contrary to MAGNA CHARTA, cap. 29. *Nulli vendemus, nulli negabimus, aut differemus justitiam, vel rectum.* An ambassador by his contract renounces his privilege as far as to subject himself to the laws in force in that country where the contract was made (*a*).

(*a*) The persons who were concerned in this arrest were examined before the privy council, and seventeen were committed to prison; most of whom were prosecuted by information in the court of queen's bench at the suit of the Attorney General, and at their trial before Lord Chief Justice HOLT, were convicted of *the facts* by the jury; reserving the question of law, how far those facts were criminal, to be afterwards argued before the Judges; which question was never determined, 1. Bl. Com. 255. Boyer's Annals of Queen Anne. But to satisfy the clamours of the foreign ministers, who made it a common cause, as well as to appease THE CZAR, all the proceedings, &c. against the said ambassador are, by 7. *Ann.* c. 12. declared void, and it is enacted, "that "all writs and processes that shall at any "time afterwards be sued forth or prose-"cuted, whereby the person of any am-"bassador or other public minister of any "foreign prince or state, authorized and "received as such by her majesty, or the "domestic or domestic servant of any "such ambassador or other public minis-"ter, may be arrested or imprisoned, or "his or their goods or chattels may be dis-"trained, seized, or attached, shall be "deemed null and void; but it is pro-"vided, that no merchant or other trader "whatsoever, within the Statutes of "Bankrupts, who shall put himself into "the service of such ambassador, &c. shall "have any manner of benefit by this act; "and also that no person shall be proceed-"ed against for having arrested the ser-"vant of any ambassador, &c. unless the "name of such servant be first registered "in the secretary of state's office; and "transmitted by such secretary to the "sheriff of *London*, &c. who shall hang "up the same in some public place in "their offices, whereto all persons may "resort and take copies thereof, without "fee or reward."—For judicial decisions on this statute see Barbuit's Case, Cases T. T. 281. Triquet *v.* Bath, 3. Burr. 1748. Seacomb *v.* Bowlney, 2. Wilf. 20. Heathfield *v.* Chilton, 4. Burr. 2015. Poitier *v.* Croza, 1. Black. Rep. 48. Wedmore *v.* Alvares, Stra. 797. Ld. Ray. 1594. Carolina's Case, 2. Wilf. 78. Holmes *v.* Gordon, Annally's Rep. 2. Masters *v.* Manby, 1. Burr. 401. Lockwood *v.* Coysgarne, 3. Burr. 1676. Hopkins *v.* De Roebuck, 3. Term Rep. 79.

MICHAELMAS

MICHAELMAS TERM,

The Eighth of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Simon Harcourt, *Knt. Solicitor General.*

---

* Anonymous. Caſe 3.

By the cuſtom of *London*, a *feme covert* may carry on trade as a *feme ſole*; and may ſue and be ſued without her huſband.

Cro. Car. 68. 3. Burr. 1784. 1. Bl. Rep. 570. 2. Com. Dig. "Baron and Feme" (A. 2.).

BY A RETURN to a *habeas corpus*, it appeared, that in the city of *London* there is a cuſtom, that if a *feme covert* exerciſe a trade in which her huſband does not at all concern himſelf *(intromitteret)*, ſhe may be ſued as a *feme ſole*, for debts contracted in the carrying on of that trade; and if ſhe has not goods that are not her huſband's, ſhe muſt be impriſoned until ſhe pay them; and as ſhe may be ſued, ſo ſhe may ſue as a *feme ſole* for debts owing her, in her way of trade, and within the city. She has a ſpecial and ſeparate intereſt in the profit of her trade, or elſe it were an unreaſonable cuſtom (*a*).

(*a*) But it is decided, that a *feme covert* cannot ſue without her huſband as a ſole trader, by the cuſtom of *London*, in the *ſuperior courts* at *Weſtminſter*, Caudell *v.* Shaw, 4. Term Rep. 361.

HILARY TERM,

The Eighth of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*
Sir Simon Harcourt, *Knt. Attorney General.*
Sir Robert Eyre, *Knt. Solicitor General.*

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* Hadley *againſt* Styles.

Caſe 4.

In debt on bond for 300l. and *nil debet* pleaded, a verdict of *nil debet* for 200l. and *debet* for 100l. is good.

S. C. 2. Salk. 664. Moor, 957. 1. Roll. Rep. 257.

IN A WRIT OF ERROR upon a judgment in the court of common pleas, the error inſiſted upon was this:

An action of debt was brought, and the jury found for the plaintiff as to part, and for the defendant as to the reſt.

IT WAS OBJECTED that this verdict was naught, becauſe a debt is an entire thing; and upon a *nil debet* the jury cannot ſever; and ſhould a man bring an action of debt for eighty pounds, and declare for leſs, this would be a variance between the writ and the count, unleſs he ſhewed how the reſt was ſatisfied.

This THE COURT agreed to:

But yet THE COURT were of opinion, that if the party brought an action for the whole debt, and a part of it was paid, the jury might, upon a *nil debet*, ſever, as in caſe of rent.

Adjournatur.

EASTER

EASTER TERM,

The Ninth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
} *Juſtices.*

Sir Simon Harcourt, *Knt. Attorney General.*

Sir Robert Raymond, *Knt. Solicitor General.*

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* Sir Edward Seymour's Caſe.

Caſe 5.

IN A TRIAL OF EJECTMENT between *Sir Edward Seymour* and his mother-in-law, the Court allowed the contents of a deed to be given in evidence, by witneſſes; nay witneſſes who put the contents of the deed in writing upon memory, four or five days after reading the deed.

The plaintiff in ejectment may give parol evidence of the contents of a deed in the hands of the defendant, after notice and refuſal to produce it.

Bull. N. P. 294. 4. Burr. 2488. 2. Term Rep. 201.

THE COURT ſeemed of opinion, that in caſe a deed was loſt by ſome inevitable accident, that there it might be proved by a copy. But in caſe there was no copy, the contents of it could not be proved from the memory of thoſe that knew the deed; and though it were hard for a man that had no copy, to loſe the benefit of his deed, yet the inconveniencies of admitting that ſort of evidence would be greater.

But here the opinion of the Court was founded upon a particular reaſon, for the deed by which the plaintiff was to prove his title was not loſt, but proved to be in the hands of the defendant; ſo that in this caſe the danger of allowing this ſort of evidence was none at all; for if the defendant was wronged by the parol evidence, it was in his power to ſet all right by producing the deed.

TRINITY

TRINITY TERM,

The Ninth of Queen Anne,

IN

The Queen's Bench,

Sir Thomas Parker, *Knt. Chief Juſtice,*

Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
} *Juſtices,*

Sir James Mountague, *Knt. Attorney General,*

Sir Robert Raymond, *Knt. Solicitor General,*

Caſe 6.

* Pariſh of Honiton *againſt* St. Mary Axe.

A certificate only concludes the pariſh granting it, againſt the pariſh to which it is granted.

S. C. 2. Salk. 535.
S. C. 1. Seſſ. Caſ. 8.

A is ſent from the pariſh of *H.* to the pariſh of *C.* with a certificate, ſubſcribed by the churchwardens of *H.* and two juſtices of the peace; whereby at the time of his removal he is acknowledged a ſettled inhabitant of the pariſh of *H. A.* grows chargeable to the pariſh of *C.* who by virtue of that certificate ſend him back to *H.*

The queſtion was, Whether this certificate of the pariſh of *H.* ſhall not be a concluſion or an eſtoppel to the pariſh of *H.* from ſaying that his laſt ſettlement was at ſome other pariſh; not only with reſpect to *C.* for of that there was no doubt, but with reſpect to any other pariſh whatſoever.

The reaſons urged why this certificate ſhould be an eſtoppel only with reſpect to the pariſh of *C.* were,

FIRST, and eſpecially, A caſe of two pariſhes in the town of *Northampton*, in the ſecond year of *Queen Anne* (*a*), where, upon an order removed by *certiorari* into the court of king's bench, this very queſtion was ſo determined.

(*a*) 2. Salk. 530.

* SECONDLY,

PARISH OF HONITON *againſt* ST. MARY AXE.

* SECONDLY, Upon ſuppoſition that this certificate was to be eſteemed an eſtoppel from finding out any ſettlement whatſoever, it will make churchwardens very cautious of putting their hands to ſuch certificates, which will in a great meaſure prevent the benefit of the ſtatute 8. & 9. *Will.* c. 30.

THIRDLY, It is not reaſonable that the indemnification ſhould extend farther than the damnification; if therefore the pariſh of *C.* the only pariſh damnified, be indemnified, this is enough.

FOURTHLY, No injury is done to any one by this interpretation of the act, for if the third pariſh to whom he is ſent, can ſhew that he had not his laſt ſettlement there, then all things are *in ſtatu quo*; but if the truth is, that he was really ſettled there, then that pariſh ought to provide for him. But taking the law to be the other way, *viz.* that according to the meaning of the act, the certificate is a concluſion from finding any ſettlement in any pariſh whatever, the pariſh granting it may be obliged to maintain him in their own wrong.

FIFTHLY, It is not fit that it ſhould be in the power of churchwardens to prejudice the pariſh in matter of property.

SIXTHLY, The ſtatute mentions the two pariſhes only.

THE ARGUMENTS *for the other ſide* of the queſtion were:

FIRST, Expedient, or not expedient, is no good argument againſt the expreſs letter of a law.

SECONDLY, The parliament never ſuppoſed, that the churchwardens and juſtices of the peace would certify a falſhood; and therefore the act ſays, "that the certificate ſhall oblige the pariſh that gives "it, to receive and provide for, &c. when he becomes chargeable;" but according to this conſtruction the pariſh is not obliged, &c.

THIRDLY, As to what was ſaid, that this would make people cautious of granting certificates, it may be anſwered, that the eaſing the pariſh for a time, and it may be for ever, will be motive enough.

* [11] * FOURTHLY, The ſtatute of the 3. *Will. & Mary*, c. 12. ſays, "that the paying of taxes ſhall make a ſettlement;" if therefore he pay taxes at *C.* and by virtue of this certificate is ſent back to *H.* the third pariſh to which by this conſtruction he muſt be ſent, will loſe an advantage that the law gives it. Beſides, what ſhall hinder the third pariſh from ſending him back to *C.* and ſo by conſequence the end of the act, which was moſt certainly the indemnification of *C.* will be fruſtrated.

FIFTHLY, There is no doubt but it is in the power of churchwardens to damage the pariſh, and that in matter of property too, as by taxing an indigent perſon, and ſo conſequently making a ſettlement. According to this conſtruction the inconvenience is little or none, for it is but to take care to certify the truth. But according to the other

other conſtruction all will be ſet a-float again, and poor perſons harraſſed and oppreſſed by being ſent for ever from pariſh to pariſh.

PARISH OF HONITON *againſt* ST. MARY AXE.

THE COURT were clearly of this opinion, but took time to conſider of the *Northampton precedent* (*a*); but afterwards, *ut audivi*, held the certificate an eſtoppel upon *Honiton* againſt the whole world (*b*).

(*a*) The caſe of All Saints *v.* St. Giles, 1. Salk. 530. pl. 16.

(*b*) S. C. 1. Seff. Caſes, 8. and S. C. 1. Salk. 535. *accordant*. But the authority of this caſe is denied, and it is now determined that a certificate is only *concluſive* upon the pariſh granting it, with reſpect to that pariſh to which it is granted, though it is *prima facie* evidence as to others, Rex *v.* Lubbenham, 4. Term Rep. 251. 2. Conſt's P. L. 730. pl. 647. See alſo Rex *v.* New Windſor, 1. Stra. 186. and Rex *v.* Petham, Burr. S. C. 154.

MICHAELMAS

MICHAELMAS TERM,

The Ninth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Juſtices.*
Sir Robert Eyre, *Knt.*

Sir Simon Harcourt, *Knt. Attorney General.*

Sir Robert Raymond, *Knt. Solicitor General.*

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* Buckley *againſt* Pirk.

Caſe 7.

IF AN EXECUTOR take poſſeſſion of the term of the teſtator, and an action is brought againſt him in the *debet* and *detinet* for rent or non-repairs, it is abſurd for him to plead "NO ASSETS "*ultra*" what will ſatisfy ſuch and ſuch judgments, becauſe in ſuch a caſe, the ſurplus of the profits, rent, and repairs deducted, is all that is aſſets, and liable to the judgments; and therefore the reſt of the profits are ſo appropriated to the payment of rent and repairs, as not to be exhauſted by debts.

An executor cannot plead *plene adminiſtravit* to an action for rent or non-repair, on the covenant of the teſtator.

S. C. 1. Salk. 317. 1. Will.

Baniſter *againſt* Hopton.

Caſe 8.

IT WAS AGREED, in a motion for *a prohibition* in this caſe, that though a preſcription, as whether a whole pariſh or a ſelect veſtry ſhould chuſe churchwardens, be a matter triable at common law by A JURY, yet ſentence is to be given in the ſpiritual court according to their verdict; and therefore though this be a matter triable at common law, yet if the party ſubmit to a trial in the ſpiritual court, by not demanding *a prohibition*, it will be too late after ſentence to move for one.

Spiritual court juriſdiction.

2. Salk. 548.

Caſe 9.

* Forte *againſt* Buviere.

Pariſhioners are rateable to the building of a gallery in the church.

3. C. 1. Seſſ. Caſes, 13. 2. Roll. Rep. 24. 2. Inſt. 489. 1. Salk. 164. 2. Roll. Abr. 291. 3. Mod. 211. 3. Burr. 1689. 1. Seſſ. Caſes, 14.

THE major part of the pariſh, aſſembled in veſtry, taxed the pariſh for building of A GALLERY, each pariſhioner ten times the value of an ancient rate. One pariſhioner refuſed payment, and was ſued in the ſpiritual court, whereupon he prayed a prohibition.

FIRST, Becauſe a pariſh cannot be taxed for building A GALLERY, which was neither uſeful nor ornamental to a church.

THE COURT was of opinion, that although before the Reformation few churches had any pews in them, yet as they have been ſince thought neceſſary, and the pariſh is chargeable with them, if there are not pews ſufficient in the body of the church, the pariſh may be charged with the building of galleries; but that the churchwardens are not puniſhable for neglecting to erect them, as they are for not repairing the bells.

Churchwardens may make a new rate upon the model of an old, but cannot make a ſtanding rate.

SECONDLY, The oldneſs of the rate. But the caſes produced to maintain the prohibition on this head, did not come up to it; they being granted in caſes where the rate was to continue always the ſame; but here there was a new rate modelled by the old; and if ten times the value of the old rate had been put into one intire ſum, it would have been plain; beſides, there is no need for the pariſh to depart from an old rate, until it grow unequal.

THE COURT was of opinion, that churchwardens cannot make a ſtanding rate *pro omnibus temporibus*, or to bind their ſucceſſors, becauſe circumſtances may alter, even though it was when made an equal rate, for it may become unequal: but that in the preſent inſtance it was *a new rate* aſſeſſed on the model of an old rate.

Caſe 10.

Pariſh of St. Mary of Reading *againſt* St. Lawrence of Reading.

Exerciſing the office of warden, in the pariſh where a man lives, is a ſettlement within 3. & 4. *Will. & Mary*, c. 11. ſ. 6. though he be not choſen by the pariſh, and exerciſes his office through the whole borough.—S. C. Foley, 121. S. C. Fort. 310. S. C. 19. Viner, 379. S. C. 3. Burr. 505. S. C. Sett. & Rem. 3. S. C. 2. Bott, 282.

ONE *Joſeph Marlow* was firſt an inhabitant of *St. Mary, Reading*; afterwards he came into the pariſh of *St. Lawrence, Reading*; and during his ſtay there, was choſen *warden for the borough*, and exerciſed that office as well in that pariſh as in ſome others: Afterwards he removed to *St. Mary's*, and there became chargeable.

The queſtion was, Whether his reſiding in the pariſh of *St. Lawrence*, and exerciſing the office of *warden of the borough* in that pariſh, though he did it in others too, was a ſettlement, by the 3. & 4. *Will. & Mary*, c. 11. ſ. 6. or no?

THE

PARISH of ST. MARY of READING *againſt* ST. LAWRENCE of READING.

* THE COUNSEL for the pariſh of *St. Lawrence* inſiſted, that to make a ſettlement purſuant to the ſtatute 3. & 4. *Will. & Mary*, c. 11. two things were requiſite.

FIRST, That the office muſt be a publick and annual office for the pariſh; and that this was not an office for the pariſh but for the borough; neither was he choſen by the pariſh.

SECONDLY, That it muſt be executed in the pariſh; but this office, though it was executed in the pariſh of *St. Lawrence*, was executed in other pariſhes too; and upon this ground it was very lately adjudged, that the payment of a *ſcavenger's rate*, being a ward rate, was no ſettlement within the act (*a*).

POWELL, *Juſtice*, was of opinion, that this was a ſettlement within the act, and that a man exerciſing an office in a pariſh, though in another too, and though not choſen by the pariſh only, might yet be eſteemed properly enough a parochial officer.

PARKER, *Chief Juſtice*. The words of the act are as general with reſpect to the payment of taxes, as to the exerciſe of offices; and therefore ſince the payment of a *ſcavenger's rate* did not, in the opinion of the Court, becauſe a ward rate, amount to a ſettlement, by a parity of reaſon, neither will the exerciſe of ſuch an office.

POWYS, *Juſtice*, was of opinion, that he was a parochial officer, and more; and that therefore he had gained a ſettlement.

EYRE, *Juſtice*. The ſtatute 1. *Jac.* 2. c. 17. made notice in writing left with the overſeer of the pariſh neceſſary to a ſettlement. The payment of taxes and the exerciſing of offices, upon the equity of that act, have been adjudged equivalent to a notice in writing (*b*); and this act of the 3. & 4. *Will. and Mary*, c. 11. ſeemed to him made for the corroborating the equitable conſtructions upon that ſtatute. He was of opinion that it was a ſettlement, and that there was a vaſt * difference, in point of the notoriety, between the payment of a ſcavenger's rate, and exerciſing the office of a ſcavenger; for the one might eſcape the notice of the pariſh, the other not. * [15]

PARKER, *Chief Juſtice*. If the reaſon of the act be founded upon the notoriety of the fact, MR. JUSTICE EYRE is in the right. But he was of opinion, that the act went upon this reaſon, *viz.* that a perſon choſen to a parochial office, or aſſeſſed to a parochial rate, was not a perſon likely to become chargeable; and this was the reaſon why a hiring for a year, and a ſervice accordingly, make a ſettlement.

(*a*) St. Giles Cripplegate *v.* St. Mary Newington, 19. Viner Abr. 386. 2. Bott P. L. 226. But now by 9. *Geo.* 1. c 7. § 6. "no perſon whatſoever who ſhall "be taxed to the ſcavenger, and ſhall "pay the ſame, ſhall be deemed to have "a ſettlement by reaſon of paying ſuch "ſcavenger's rate."

(*b*) But ſee Rex *v.* Payne, 1. Show. 12. 3. Mod. 247. Rex *v.* Talbury, Foley, 123. Rex *v.* Chertſey, 5. Mod. 454. Rex *v.* Abbot's Langley, 2. Bott. P. L. 125. 2 Stra. 835. *contra*.

PARISH OF ST. MARY OF READING *againſt* ST. LAWRENCE OF READING.

The next Term, by conſent of ALL THE COURT, it was adjudged a ſettlement (*a*).

(*a*) See Gatton *v.* Milwich, Salk. 536. Biſham *v.* Cook, Stra. 411. Peale *v.* Bourne, Stra. 942. St. Maurice *v.* St. Mary Kalandar, Burr. S. C. 27. Rex *v.* Whitchurch, Burr. S. C. 365. Rex *v.* Winterbotham, Burr. S. C. 520. Rex *v.* Liverpool, 3. Term Rep. 118. Rex *v.* Whittleſea, 4. Term Rep. 807. and 2. vol. of Mr. Conſt's edit. of Bott's Poor Laws, 282 to 310. where all the caſes on this ſubject are collected.

Caſe 11.

Cook *againſt* Parſons.

Depoſitions in chancery not good evidence to deſtroy the validity of a will.

AT A TRIAL at *niſi prius*, in *London*, the caſe was this: It was ſaid at the concluſion of a will, "*ſigned, ſealed, and delivered*" by ſuch a one, "teſtator," and then ſubſcribed by three witneſſes.

Bull. N. P. 239. 2. Stra. 920. 1. Stra. 101. 1. Salk. 286. 4 Mod. 146. 5. Mod. 211.

It appeared by depoſitions in a chancery cauſe, whereof the bill and anſwer were loſt, that they ſubſcribed the will in the preſence of the teſtator, but at three ſeveral times (*a*).

The verdict was for the plaintiff; but a caſe of two points was agreed upon for further arguments:

FIRST, Whether, the bill and anſwer being loſt, the depoſitions could be admitted as evidence?

PARKER, *Chief Juſtice*, who tried the cauſe, was of opinion, that the depoſitions ſigned by the witneſſes, though the bill and anſwer were loſt, might be allowed as evidence to ſupply any point where the will was ſilent, but not to contradict the will.

Execution of a will.

The SECOND POINT was, Whether the ſigning of three witneſſes, but at three ſeveral times, was a good execution of the will within the ſtatute of Frauds and Perjuries (*b*)?

(*a*) See S. C. Prec. Chan. 184. 1. Eq. Abr. 280. 2. Eq. Abr. 371. 761.

(*b*) It has been determined that the witneſſes may ſubſcribe the will at different times; but they muſt ſee the teſtator ſign or hear him acknowledge his ſignature, and the ſubſcribing muſt be in his preſence. Freem. 486. Prec. Chan. 285. 2. Chan. Caſes, 109. See alſo, Longford *v.* Eyre, 1. Peer Wms. 740. Carleton *v.* Griffin, 1. Burr. 549. Right *v.* Price, Dougl. 229. Caſſon *v.* Dade, 1. Bro. Caſ. Ch. 99. Ellis *v.* Smith, F. Vezey's Rep. 11.

HILARY TERM,

The Ninth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*
Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Juſtices.*
Sir Robert Eyre, *Knt.*
Sir Simon Harcourt, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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*Goodwin *againſt* Godwin.

Caſe 12.

THE point in queſtion was, Whether an action of debt founded upon a judgment in the king's bench, might be brought, pending *a writ of error* in THE EXCHEQUER-CHAMBER.

Debt lies on a judgment in the king's bench, pending a writ of error in the exchequer-chamber.

IT WAS ARGUED *in favour of the affirmative*, that the judgment was not ſuſpended by the writ of error; becauſe, if it was, a releaſe of all demands would not be a releaſe of a judgment pending a writ of error, which undoubtedly it is. It was alſo ſaid to be a received rule in the common pleas, that an action of debt would lie upon a judgment in the common pleas, pending a writ of error in the king's bench; and that by parity of reaſon it ought to do ſo upon a judgment in the king's bench, pending error in the exchequer-chamber; and all this was fortified by ſeveral caſes in point (*a*).

1. Lev. 92. Cowp. 72. 3 Com. Dig. "Debt" (A. 2).

THE COURT. Theſe actions of debt pending writs of error were never favoured, either by LORD HALE, or by HOLT, *Chief Juſtice*.

* The point in queſtion was given up upon account of the number of caſes in point, that debt would lie pending error.

(*a*) See 1. Sid. 336. Lutw. 602. 1. Lev. 153. Raym. 100. 1. Wilſ. 316.

On a writ of error on a judgment in the king's bench to the exchequer-chamber, a *tranſcript* of the record, and not *the record* itſelf, is removed.

SECONDLY, It was ſaid, that the record was not removed by the writ of error, but that only a tranſcript was ſent for.

BUT IT WAS STRONGLY INSISTED upon, and the ſtatute of 27. *Eliz.* c. 8. relied upon for that purpoſe, that the very record itſelf was, in point of law, removed by the writ of error; and that therefore the declaration was naught, being of a record in *the king's bench*, whereas it ſhould have been upon a record in THE EXCHEQUER-CHAMBER.

1. Sid. 236. 1 Lev. 153.

THE COURT. It is to be conſidered, whether, though in fact *a tranſcript* was only ſent, yet whether in point of law the record itſelf was not removed, becauſe without it the judgment itſelf could not be affirmed or reverſed; and alſo whether they could ſuppoſe the record in two places at once, in the one place to ſupport debt, in the other error (*a*).

The authorities only kept the Court from rejecting theſe actions; and therefore, though they held the writ of error to be no plea in bar, yet they doubted whether they might not admit it as a plea in abatement.

Adjournatur.

No bail in error on a judgment. 3. Salk. 55.

NOTE, In theſe kind of actions, to diſcourage them, bail never allowed (*b*).

(*a*) See Vicars *v.* Heyden, Cowp. 483.

(*b*) See, upon this ſubject, Sellon's Practice, 43 to 50.

EASTER

EASTER TERM,

The Tenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir Thomas Powys, *Knt.* } *Juſtices.*

Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

* Jeffry *againſt* Barrow.

Caſe 13.

In debt againſt an heir, if the defendant plead *riens per diſcent* at the time of the original purchaſed and the plaintiff reply "ſufficient lands "by diſcent," and the jury find that he had ſufficient lands by diſcent, without finding *the value* of the lands, A REPLEVIDER ſhall be awarded.

S. C. Gilb. 141. 270.
2 Roll Abr. 71.
3. Bac. Abr. 28.

THIS was an action of debt upon bond, brought againſt the heir;" and, upon "*riens per diſcent*" pleaded, the plaintiff replied, that he had lands, &c. ſufficient to diſcharge, &c. The jury find for the plaintiff, *viz.* that ſufficient lands to diſcharge, &c. did deſcend.

IT WAS MOVED *in arreſt of judgment*, that this pleading being grounded upon 3. & 4. *Will. & Mary*, c. 14. that act ought to have been exactly purſued; and then the iſſue ſhould have been only, whether any lands deſcended, and not the value of the lands; and if the jury found for the plaintiff, then the jury were to inquire of the value.

PARKER, *Chief Juſtice*, ſeemed to incline to the defendant merely upon this point, that it did not appear by this verdict, whether, when the jury found the deſcent of ſufficient lands, they meant ſufficient in reſpect to the debt in equity, or at common law, *viz.* the penalty: probably the jury intended, the equitable debt only; whereas judgment muſt be given upon the penalty. The

5. Mod. 123. 3. Salk. 280. 5. Com. Dig. "Pleader" (2. E. 4.) 3. Bac. Abr. 28.

JEFFAY *againſt* BARROW.

* plaintiff put himſelf to great hazard in this way of pleading; *for* though it had been found that lands were deſcended, yet if theſe lands were found inſufficient, judgment muſt have been given for the defendant.

POWELL, *Juſtice*, doubted whether, this not being an *immaterial iſſue*, but a material one, and more, it was not helped by 32. *Hen.* 8. c. 30. He doubted likewiſe whether, if it were not, yet this being an iſſue appointed by this act, and more, it might not be ſupplied by another inquiſition by another jury.

POWYS and EYRE, *Juſtices*, were of another opinion as to this point, for the ſtatute ſays "the jury," *viz.* the jury that tried the cauſe.

POWYS, *Juſtice*, as to the principal matter, concurred with PARKER, *Chief Juſtice*.

EYRE, *Juſtice*, was of opinion, that this verdict was equivalent to an inquiſition.

THE COURT thought, that the end of the act of parliament was to help the creditor in caſe of alienation, and alſo the heir, that he might not run ſuch a riſque in pleading "*riens per deſcent*" as to ſubject himſelf to the payment of the whole, if but a penny was found to be deſcended *(a)*.

(a) This caſe was argued a ſecond time; and THE COURT, it is ſaid, awarded a repleader, becauſe it was part of the duty of the jury upon this iſſue to find the value of the lands which the defendant had by deſcent. S. C. Gilb. Rep. 282.—See the caſe of Redſhaw *v.* Heſter, 5. Mod. 123. 3. Salk. 180.

EASTER

EASTER TERM,

The Tenth of Queen Anne,

IN

The Court of Chancery,

Simon, Lord Harcourt, *Lord Keeper.*

Sir John Trevor, *Knt. Maſter of the Rolls.*

Gibſon *againſt* Albert.

Caſe 14.

OBITER: If a man unneceſſarily make any one a defendant, he thereby cuts himſelf off from the benefit of his evidence, for it is his own fault.

Evidence. Chancery.

S. C. 2. Eq. Abr. 396.

But where ſeveral are made defendants, it will not hinder any one of the defendants from the benefit of the evidence of any others that are made ſo.

* Indeed, in caſe of truſtees, it is neceſſary that they be made defendants, and therefore there the plaintiff may have the benefit of their evidence. *[20]

Brown *againſt* Litton.

Caſe 15.

A MASTER OF A SHIP went a trading voyage beyond ſea. The ſucceeding maſter opened the effects of the deceaſed, in the preſence of the crew, and then ſent a letter, with a bond incloſed, to the widow of the deceaſed, whereby he binds himſelf to anſwer to her the ſum of three hundred pounds, if the ſhip arrive ſafe, the ſum the deceaſed left being two hundred pounds; which was the rate of *reſpondentia* bonds there. The maſter trades, and makes three hundred *per cent.* of the money.

If the captain of a trading veſſel die on the voyage, and the mate takes upon him the management of his inveſtment, the court of chancery will allow him a reaſonable recompence for his care and trouble, and oblige him to account for *the profits*, and not permit him to take *the capital* at a *reſpondentia intereſt*.—S. C. 1. Peer. Wms. 140. S. C. 2. Eq. Abr. 5. 722. § C. Reg. Lib. A. 1710, fol. 600. 15. Vin. Abr. 348.—See Watſon on Partnerſhip, 442.

The queſtion was, Whether he ſhould be bound to any more than this bond, or anſwer to the widow the profits of the money made in the way of trade,

THE COUNSEL *for the maſter* would have reſembled it to the caſe of an executor or truſtee, who ſhall be accountable for the

intereſt

BROWN *againſt* LITTON.

intereſt only, and formerly for the money only. It was ſaid alſo, that if this money had been loſt in the way of trade, the maſter would have been accountable.

THE COUNSEL *on the other ſide*, and HARCOURT, *Lord Keeper*, too, thought it differed from the caſe of an executor, becauſe the ſhip was to go a trading voyage, and the money was deſigned to be laid out in trade, and the ſucceeding maſter is in effect but a truſtee for the repreſentative of the former. And they held, that if he traded with the money as with his own, with care and prudence, and then through any accident the money was loſt, he would not be accountable.

* [21] * IT WAS THEREFORE DECREED, that he ſhould account to the widow for the profit made by the trade, deducting reaſonable allowance for labour and ſkill.

HARCOURT, *Lord Keeper*, thought this reſolution neceſſary for the encouragement of trade; it being a comfort to a man to know, that if he ſhould die, the improvement of his effects in the way of trade by the ſucceeding maſter, ſhould be for the advantage of his family. If a truſtee impowered to put money to intereſt let the money lie by him, he ſhall be accountable for intereſt; and if a truſtee trade with the money, he ſhall be accountable, not for intereſt only, but for the profit of the trade; becauſe he acts of his own head, and at his own peril, without applying to the court of chancery for direction in diſpoſing of the money.

EASTER TERM,

The Tenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir Thomas Powys, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

Sadler *againſt* Daniel.

Caſe 16.

THE QUESTION was, Whether a man might be ſued in the ſpiritual court for taking away the goods of an inteſtate from the adminiſtrator; or whether a prohibition ſhould not go?

An adminiſtrator cannot ſue in the ſpiritual court to recover the inteſtate's goods wrongfully taken from his poſſeſſion; but he muſt bring *trover* at common law.

IT WAS RESOLVED there ſhould be *a prohibition*: for when an adminiſtrator is made, the power of the ordinary is determined; and there being a complete remedy, at the common law, for the adminiſtrator, in an action of *trover*, the party would by this means be doubly harraſſed; for an excommunication could never be pl aded in bar of an action of trover. It is difficult to ſay when this power was firſt veſted in the ordinary, but probably ſuperſtition was the cauſe. However, now, by the ſtatute law, the ordinary muſt grant adminiſtration (*a*), and then his power is determined; and the adminiſtrator, when put in by * the ordinary, derives his power not from the ordinary, but from the law.

* [22]

(*a*) By ſtatute 31. *Edw.* 3. c. 11. and 21. *Hen.* 8. c. 5.

Biſhop

Caſe 17. **Biſhop *againſt* Eagle.**

In an action of account by the new againſt the old churchwardens, and judgment *quòd computent*, the defendants may plead before *the auditors* that ſuch a ſum came to their hands by miſtake; that it was not due to the pariſh; and that they had repaid it to the owner.

S. C. 11. Mod. 286.

THIS was an action of account brought by the preſent churchwardens againſt the former ones. The defendants pleaded, that the plaintiffs are no churchwardens; and, on iſſue joined, a verdict was given for the plaintiffs, and judgment *quòd computent*.

The defendants before the auditors pleaded, that they received ſuch a ſum of money, as churchwardens, through a miſtake, when none was due to the pariſh; that perceiving the miſtake, they repaid the money.

To this plea the plaintiffs demurred.

IT WAS SAID *for the plaintiffs*, that no plea that would have been a good bar of the action could be pleaded before auditors. It is true, they could not have pleaded *ne unques receiver*; for they did receive, and for the uſe of the pariſh; but they might have pleaded it ſpecially, and ſo ſhewn that they were not accountable at the time of the bringing the action.

THE COUNSEL *for the defendants* allowed, that no plea which would have been a good one to the action, could be pleaded before the auditors. But here, as "*ne unques receiver*" could be no plea, ſince they did receive, and received for the uſe of the pariſh, ſo that had they been robbed, or not repaid the money, they muſt have remained accountable, it is certainly a fair defence, and admitted for true by the demurrer.

POWELL, *Juſtice*, was of opinion for the plaintiffs, for they might have pleaded this matter ſpecially, though they could not plead "*ne unques receiver*" generally.

PARKER, *Chief Juſtice*, was of opinion with the defendants. Admitting this to be a good plea before auditors, it will be neceſſary for the churchwardens to plead ſuch a * plea as ſhews them to be honeſt men, *viz.* not only that it was paid to them by miſtake, but repaid. Whereas, taking it the other way, and to be a good plea in bar, receipt by miſtake will be no receipt at all, and it will not be neceſſary to ſhew re-payment, but only that the money did not belong to the pariſh; this therefore inclined him to ſupport the plea as far as poſſible. Beſides, had they paid this money to the pariſh before the knowledge of this miſtake, the pariſh would have been charged with this money; repayment was therefore an act done in diſcharge of the pariſh, and therefore a proper plea before auditors.

*[23]

PARKER, *Chief Juſtice*, and POWELL, *Juſtice*, differed, Whether or not the churchwardens, after payment of the money to the pariſh, *viz.* the uſe for which they received it, and this before knowledge of the miſtake, could have been charged in an *indebitatus aſſumpſit* for the money? The former thought they might, the latter that they could not.

There

There was ANOTHER POINT in this caſe, *viz.* Whether the churchwardens ſhould be allowed their expences, and ſurpluſage, in caſe their expences out-balanced, &c.

Churchwardens ſhall be allowed their expences for receiving and paying pariſh money.

THE COURT was clear that they ſhould; for churchwardens are more than bare receivers; they are in all reſpects bailiffs. The rule generally taken, that *a bailiff* ſhall be allowed expences and ſurpluſage in an action of account, but not *a receiver*, holds true only of a bare receiver, and as to him the reaſon is evident; but where the nature of the thing ſhews that the receiver muſt be put to trouble and expence, the rule is falſe.

Prec. Ch. 42.

TRINITY TERM,

The Tenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir Thomas Powys, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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* Whetherborn *againſt* Wright. Caſe 18.

WHERE A DEBT is ten pounds or upwards, by courſe of the court ſpecial bail is required, otherwiſe not.

In debt on bond, the defendant can only be holden to bail for the real ſum due.

Not common, where an action of debt is brought upon a bond of twenty pounds, conditioned for the payment of nine pounds, to hold to bail; for though the penalty, which is the legal debt, exceeds ten pounds, yet the real and equitable debt is leſs. But upon ſome particular caſes, as where it is to be feared a perſon will run away, &c. the Court will hold to bail; for the legal debt exceeds ten pounds (*a*).

1. Salk. 100. Sellon's Pract. 45.

(*a*) See Kirk *v.* Strickland, Dougl. 449. Willis *v.* Dent, Sellon's Pract. 44.

Templeman *againſt* Caſe. Caſe 19.

ACTION UPON THE CASE for entering the houſe and taking the goods of the plaintiff in the ſaid houſe. The defendant pleads in bar, that he entered in aid of a bailiff who had a writ of execution, and took the goods of another, and not of the plaintiff. The plaintiff demurs.

To treſpaſs for entering a houſe and taking goods, the defendant may plead, that he entered in aid of a bailiff, and took the goods of another.

Upon

TEMPLEMAN *against* CASE.

* Upon the demurrer three points were made:

FIRST; That this plea amounted to no more than the general iſſue.

SECONDLY; That this plea was naught, for want of ſhewing how the goods came there; whether wrongfully or rightfully.

THIRDLY, That it is naught, becauſe it is ſaid in aſſiſtance; and not by command of the bailiff.

THE COURT. The plea in bar is good, notwithſtanding theſe exceptions.

As to THE FIRST POINT, a poſſeſſory right is ſufficient to maintain an action of *treſpaſs* or *caſe*, though not a *replevin*; and upon *not guilty* pleaded, this given in evidence, that they took another man's goods, and not the goods of the plaintiff, would not have maintained ſuch a general plea; becauſe, though the goods ſhould not in reality be the plaintiff's, yet being in his houſe and poſſeſſion, they are ſo far his as to maintain this action.

As to THE SECOND POINT, it is impoſſible for the defendant to ſhew how.

As to THE THIRD POINT, the command or deſire of the bailiff is not neceſſary; for every one not only may, but is by law bound to give their aſſiſtance to officers in execution of juſtice.

Caſe 20. Petworth Pariſh.

An order of removal is concluſive againſt every pariſh, as to all antecedent ſettlements.

2. C. 1. Self. Caſes, 87.

ON A MOTION to quaſh an order of juſtices three exceptions were taken:

FIRST, That there was a former order from the pariſh of *A.* to that of *Petworth*; and this order being affirmed upon an appeal to the ſeſſions, it was final not only between the pariſhes that were parties, but all others, except a ſubſequent ſettlement could be found out; that therefore this order, which was to remove one *William Pack* and *Katharine* his wife, together with their children, from *Petworth* to *Ringmore*, ſhould be quaſhed.

*[26] Mod. Caſes in Law and Equity, 227.

*SECOND EXCEPTION, That the ages of the children not appearing, they may have gained a ſubſequent ſettlement.

THIRD EXCEPTION, There is no adjudication that the party has become chargeable, but only that he is likely to become chargeable.

THE COURT. The firſt and ſecond exceptions are good; the firſt is a point lately ſettled; but as to the laſt, the order is good notwithſtanding.

Caſe 21. Player *againſt* Bandy.

In debt on bond, the plaintiff ſhall have coſts, though a tender was made before the action was brought.

RESOLVED, that in an action of debt upon a bond, though the money be tendered before action brought, which is refuſed, that yet the plaintiff muſt have coſts; for the ſtatute 4. & 5. *Anne*,

c. 16.

c. 16. for the amendment of the law, gives the Court no juriſdiction until after action brought, and therefore they cannot take notice of a tender before.

PLAYER *againſt* BANDY.

Beſides, it was ſaid by POWELL, *Juſtice*, and contradicted by none, that that ſtatute had enabled the defendant to plead payment, or to bring the money into court, but not to plead tender, refuſal, and *encore priſt*.

The Queen *againſt* Mathews.

Caſe 22.

THIS was a conviction upon the ſtatute of 4. & 5. *Anne*, c. 14. for the preſervation of the game.

A conviction on 5. *Anne*, c. 14. for killing game, muſt negatively ſtate the qualifications mentioned in the 22. & 23. *Car.* 2. c. 25.

Two exceptions were taken:

FIRST, That the charge ſetting forth that the defendant *Mathews*, not being a perſon ſo and ſo qualified, and enumerating diſtinctly the ſeveral qualifications in the ſtatute 22. & 23. *Car.* 2. c. 25. for the preſervation of the game, omitted a new qualification allowed by this act, *viz.* that he was not a perſon authorized by a lord or lady of a manor to kill game for their uſe.

THE COURT was of opinion, that had it been laid generally thus, "that he, not being a perſon qualified according to law," it had been enough; but the qualifications being diſtinctly and ſeverally mentioned, the omiſſion of one is fatal (*a*).

* [27]

SECONDLY, That the perſon was here charged with ſo many five pounds as he killed hares in the ſame day, * whereas the offence in the ſtatute was the keeping of dogs, engines, &c. not killing hares.

A perſon cannot be convicted on 4. & 5. *Anne*, c. 14. in more than one penalty on the ſame day.

THE COURT was of opinion, that the offence for which the ſtatute gave the forfeiture, was the keeping of dogs and engines, not killing the hares. If a man not qualified go a hunting, and kill never ſo many hares upon the ſame day, he would forfeit but one five pounds, for it is but one offence. But if a man keep dogs, and go a hunting ſeveral days, and kill hares; if it had been thus laid, "that he, on ſuch a day, kept dogs and killed, "&c." and then again ſuch a day; by laying it thus ſeverally, the offence is ſevered, and he ſhall forfeit five pounds for each offence (*b*).

Adjournatur.

(*a*) It is now fully eſtabliſhed, that this general mode of ſtating the want of the qualifications mentioned in theſe ſtatutes is not ſufficient, Rex *v.* Marriott, 1. Stra. 66. Rex *v.* John Hill, Ld. Raym. 1415.; and that in *a conviction* on theſe ſtatutes the qualifications muſt be all negatively ſet out, Rex *v.* Jarvis, 1. Burr. 148.; Rex *v.* Wheatman, Dougl. 331. But a general averment that the defendant was not qualified is ſufficient in *an action*, Bluet *Qui Tam v.* Nead, Comy. Rep. 525.; and in a conviction on ſtatutes where the informer need not negative any of the exceptions, if he negative ſome of them only, yet the conviction is good, Rex *v.* Hall, 1. Term Rep. 320.

(*b*) See Rex *v.* Gage, Stra. 546. Crepps *v.* Durden, Cowp. 640.

Case 23.

Michell *againſt* Reynolds.

A bond conditioned for reſtraining a man from the exerciſe of his trade for a certain time, and in a certain place, when entered into upon a fair and reaſonable conſideration is good. S. C. poſt. 85. 130.

AN ACTION OF DEBT was brought upon a bond, the condition whereof was, that "whereas *A.* had taken the ſhop of *B.* "who was a baker, for the term of ſo many years, and had given "*B.* ſo much money for it; the condition of this obligation was "ſuch, that if during thoſe years *B.* ſhould not exerciſe the trade "of a baker within the pariſh where the ſhop was, that then the "bond ſhould be void, otherwiſe, &c."

The queſtion was, Whether this bond was good, or not?

* [28]

S. C. 1. Peer. Wms. 181. S. C. Fort. 296. Cro. Jac. 739. Cro. Eliz. 872. Powel on Contracts, 169.

IT WAS ARGUED, that the bond was good. In the caſe of *Clerk v. The Taylors of Exeter* (*a*), there is, it muſt be confeſſed, a difference taken between a bond and a promiſe; and it * is ſaid, that *a bond* in this caſe would be void, but a promiſe good; and in other caſes quoted in that caſe, as in the caſe of *Broad v. Jolliffe* (*b*), this difference is warranted. The reaſons aſſigned for this difference are two: FIRST, Becauſe in a bond the jury cannot mitigate the damages, but muſt give the whole penalty, be the damage to the other by ſetting up the trade ever ſo ſmall. The ſecond reaſon is, that the public intereſt is concerned to promote and encourage trade; and therefore ſuch a condition is againſt the public intereſt, againſt MAGNA CHARTA, and *malum in ſe*, and therefore the bond void. As to the firſt of theſe reaſons, it holds againſt all bonds in general, as well as this. Beſides, the difference is not true; for even in a promiſe, if it be certain, it was ſaid, that the jury have no diſcretionary power in giving damages. As to the ſecond it was anſwered, that how prejudicial ſoever to the public a general and abſolute reſtraint of a man from his trade may be, certainly a particular reſtraint, limited to one place only, as the preſent caſe is, can be none at all; for how is the public concerned whether a man exerciſes his trade in *Holborn* or in *the Strand*? There is a great difference between the opinion of the Court upon matters before them, and what is ſaid *obiter*, and collateral to the caſe in queſtion; and this caſe has never been judicially determined: but if ſuch opinions are of weight, in the caſe of *Thompſon v. Harvey* (*c*), there is a difference taken between a bond where the condition is a general reſtraint, and where it is a particular one. The bond there is adjudged to be void, becauſe it is a general reſtraint from the exerciſe of a man's trade; but there it was admitted to be good, had it been, as here it is, only a reſtraint in a particular place. As to the reaſon of the thing in general, there may certainly be a very good reaſon for the making of ſuch bonds. Suppoſe a gentleman has a noiſy ſtinking trade near him, he may be willing to give him a * valuable conſideration for removing further off. Suppoſe a man give his apprentice ſuch a ſum of money, provided he will enter into a bond of ſuch a penalty not to ſet up

* [29]

(*a*) 3. Lev. 241.
(*b*) Cro. Jac. 556.
(*c*) 2. Show. 2.

within

within ſuch a diſtance: If this bond be adjudged void, what is the conſequence but a mere circuit of action, *viz.* the forcing of him to bring an action upon the promiſe, and give this bond in evidence.

To prove the bond void, the difference taken in the Books between a bond and a promiſe was ſtrongly inſiſted upon; and the caſe of *Clerk v. The Taylors of Exeter* (*a*), where the aforeſaid difference is taken, was backed by other authorities, *viz.* *Moore*, 115. 242. 3. *Leonard*, 217. *Marſh*, 191. One reaſon more was offered, not taken notice of in the Books, that the allowing of ſuch bonds might be a means of introducing monopolies.

POWELL, *Juſtice.* Where an action is brought upon an *aſſumpſit*, though the promiſe be never ſo certain, the jury may mitigate the damages, and give what ſum they pleaſe. Many are the authorities that maintain the difference between a bond and a promiſe; no bond was ever yet adjudged good that reſtrained a man from the exerciſe of his trade: and he was of opinion, that the bond was void.

PARKER, *Chief Juſtice.* I never yet knew ſuch a bond adjudged void. The caſe of *Broad v. Jolliffe* (*c*) is the leading caſe, as to the difference between *a bond* and *a promiſe*; and the difference itſelf ſuppoſes the condition lawful; and moſt certainly there may be many good reaſons for entering into ſuch a bond. I know of no caſe, except that of an infant, and that ſtands upon another conſideration, where a promiſe ſhall be good, and a bond entered into for the performance of that promiſe void. It is ſomething extraordinary, that a court of juſtice ſhould endeavour to render the breach of a juſt and fair promiſe as eaſy as poſſible; for that would be all the conſequence of our * judgment, ſhould we adjudge the bond void; for if the plaintiff ſhould fail in this action, he may yet have recourſe to an action upon the promiſe, and give the bond in evidence of it. And as for the reaſon given for the difference between a bond and a promiſe, there is this to be ſaid againſt it, that as a jury may give leſs than the penalty, ſo they may give more. Now ſuppoſe it were my intention to bind myſelf in ſuch a penalty, not a very great one, not to uſe my trade nigh ſuch a perſon, with deſign, that if I ſhould afterwards think that the uſe of my trade would be of more advantage to me than the penalty, it ſhould be at my election, is it reaſonable that a jury, contrary to my declared intention in writing, ſhould have it in their power to give twice the penalty, if they think fit, or the other party is ſo much damnified by my breach of promiſe?

* [30]

EYRE, *Juſtice*, of the ſame opinion with PARKER, *Chief Juſtice.*

(*a*) 3. Lev. 241. (*c*) Cro. Jac. 596.

MICHELL *against* REYNOLDS.

Adjournatur (a).

(a) This case was argued again in Hilary Term, 11. *Anne*, but the judges retained the same opinion, S. C. post. 86.; and in the Hilary Term following PARKER, *Chief Justice*, delivered the resolution of the Court, that the bond was good, S. C. post. 130. because the special consideration on which it was given was set down in the condition, S. C. Fort. 296. S. C. 1. Peer. Wms. 181.—See also Chesman *v.* Nainby, 2 Stra. 739. 3. Bro. P. C. 349.

Case 24.

Lure *against* Reft.

Delay of the Court ought not to prejudice ſuitors.

AFTER A WRIT OF INQUIRY executed, and before entry of the judgment, which was delayed by the act of the Court, the plaintiff died.

It was moved that, this happening by the delay of the Court, judgment might be entered as of two or three Terms ago.

In behalf of the motion was cited the case of *Philip v. Jackſon*, where it is ſaid, that if the Court delay the entry of the judgment, there judgment may be entered as of two or three Terms ago, without entering continuances.

*[31]

Case 25.

* Thomlinſon *againſt* Dighton.

If a tenant in fee demiſe the land to his wife for life, to diſpoſe of according to her pleaſure, provided it be to ſome one of the teſtator's children, the wife takes an eſtate for life; and if the deviſor leave behind him a ſon and daughter, and the wife marries again, and by leaſe and releaſe, and fine levied, covenants to ſtand ſeiſed to the uſe of herſelf for life, without impeachment of waſte, remainder to her daughter by her firſt huſband in tail; the power is well executed. S. C. poſt. 71.—S. C. 1. Salk. 239. S. C. 2. Eq. Abr. 309. S. C. 1. Peer. Wms. 149. S. C. Comy. Rep. 194. S. C. Powel on Powers, 9. 32. 55.

THIS was a writ of error upon a judgment in the court of common pleas in an ejectment.

The caſe was this:

A tenant in fee of the lands in queſtion deviſed the lands to his wife for life, then to diſpoſe of according to her pleaſure, provided it were to ſome one of the teſtator's children. The huſband, the deviſor, died, and left behind him a ſon and a daughter; the wife married again; then the wife, by leaſe, releaſe, and fine levied, covenanted to ſtand ſeiſed, to the uſe of herſelf for life, without impeachment of waſte, remainder to her daughter by her firſt huſband in tail.

The queſtion was, Whether this conveyance of the lands was a good execution of the power, ſo that they ſhould go to the daughter; or elſe, being bad, to the heir at law, *viz.* the ſon?

The court of common pleas gave judgment for the daughter: a writ of error was brought into the king's bench.

LUTWYCHE *for the plaintiff in error.* The points conſiderable in this caſe are two: Firſt, What eſtate the wife takes by the deviſe, whether an eſtate for life or in fee. Secondly, Whether the power be well executed.

As

THOMLINSON *against* DIGHTON.

* As to THE FIRST POINT it is clear, that ſhe has but an eſtate for life; for it is expreſsly deviſed to her for life. And though the words following be, "to diſpoſe of according to her will and "pleaſure, provided it be to any of her children by the teſtator," theſe words give her but a naked power and authority, and no intereſt, as was reſolved in the caſe of *Daniel v. Uply* (*a*), where the deviſe was "to the wife, to diſpoſe to which of the children ſhe "pleaſed." But the principal caſe is here much ſtronger, for it is in expreſs words deviſed to the wife for life, *et quoties in verbis nulla ambiguitas, &c.* (*b*).

As to THE SECOND POINT, Whether the power was well executed? It is true, that there are caſes where the conveyance ſhall take effect by way of covenant to ſtand ſeiſed, when it can no other way elſe whatever (*c*): ſo is the caſe of *Croſſing v. Scudamore* (*d*), and other caſes there cited, as reported by *Ventris*; but there it is ſaid (*e*), that where there is a tranſmutation of the poſſeſſion, there the eſtate ſhall never paſs by way of covenant to ſtand ſeiſed. This is a very improper ſort of conveyance, for here the eſtate is conveyed by leaſe, releaſe, and fine, acts not proper for tenant for life. It is a rule, that a power and authority ought to be ſtrictly purſued; and in *Co. Litt.* there is this difference taken, that if a perſon authorized do leſs than his authority warrants him, it is void; but if he exceed it, it ſhall be good for as much as falls within the power, and the reſt ſhall be but ſurpluſage: now here the power is to give in fee, but is executed only in tail. By the method of the conveyance, it is very plain that the intention of the wife was to paſs the eſtate as owner, and not by virtue of the power; and the rather, becauſe the wife is here poſſeſſed of an eſtate, *viz.* an eſtate for life: beſides, the eſtate paſſes by the fine.

* PEERE WILLIAMS *for the defendant* argued, that by this deviſe the wife took an eſtate in fee. Had the deviſe been only thus, "to the wife, to diſpoſe of at pleaſure," it had been very plain that ſhe had had a fee-ſimple (*f*); then the words after added, "provided ſhe diſpoſe of it to ſome of the teſtator's children," make it a conditional fee-ſimple: it was ſo reſolved in the caſe of *Daniel v. Uply* (*g*). But being put in mind that in this caſe it was expreſsly deviſed for life, he gave up this point. * [33]

But then admitting the wife to have but an eſtate for life, he argued, FIRST, That the woman's marriage was no ſuſpenſion of the power; SECONDLY, That the power was ſufficiently, though improperly executed.—FIRST, That the ſecond marriage was no ſuſpenſion of the power, he proved from the caſe of *Daniel v.*

(*a*) Latch, 9. 39. 134. Noy, 80. 1. Jones, 137.

(*b*) 3. Leon. 71.

(*c*) See the arguments on this point of law in the caſe of Tatlock *v.* Harris, 3 Term Rep. 181. Gibſon *v.* Mind, 1. H. Bl. Rep. 569.

(*d*) 2. Lev. 9. 1. Vent. 137. 1. Mod. 175.

(*e*) 2. Vent. 318. 1. Sid. 25. 1. Roll. 329.

(*f*) Co. Lit. 113. Daliſon, 8.

(*g*) 1. Jones, 137.

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Upton (*a*), where the caſe is, A man deviſes that his wife ſhall ſell his land; the huſband dies; the wife marries; and reſolved, that the wife might not only ſell the land, but even ſell it to her ſecond huſband, which is a much ſtronger caſe than the preſent.—SECONDLY, That this was a good, though improper, execution of the power. Judges are ſaid to be *aſtuti* to do right; and therefore this power, inſtead of a ſtrict interpretation, ought to have a large and extenſive one; ſo that any writing whatever that is but enough to ſignify the intention of the parties, where the power is ſo general, and no particular way of execution is preſcribed, will be enough; and if ſo, then certainly the power is well executed. For a deed of leaſe and releaſe is a ſufficient declaration of her mind; and as for her eſtate being limited without impeachment of waſte, that ſhall be rejected as ſurpluſage, which, even in pleading, *non nocet*. As for the objection, that the method of this conveyance ſeemed as if ſhe deſigned it as owner of the land, and the rather here, becauſe ſhe was ſeiſed of an * eſtate for life, he anſwered, that there is a difference between a perſon's having ſuch an eſtate as will enable him to make ſuch a conveyance, for there it ſhall operate by way of gift as from an owner; but where a man has not ſuch an eſtate as will enable him to make ſuch a conveyance, the deed ſhall operate by way of execution of the power, and ſo is *Sir Edward Cleer's Caſe* (*b*). And though there be no recital of the power, yet if the grant cannot work without the power, it ſhall with it. But here the deed of leaſe and releaſe recites the power, which carries in it the higheſt preſumption of the intention of the parties that it ſhould ſo operate; which makes it a much ſtronger caſe. And then if it operate as *an appointment*, the eſtate ſhall not paſs from the truſtee, but the appointee ſhall be in from the will. The grand intention of the parties is the paſſing of the eſtate, and not the how or manner in which this is done, whether by virtue of the power, or by deed of leaſe and releaſe, &c.; and the Court will be more ſolicitous to uphold the primary intention of the parties, than that which is only a ſecondary one: without doubt they will never adhere to the latter, to the deſtruction of the former; and therefore, though the intention of the parties were to paſs the land by leaſe, releaſe, and fine, yet when it cannot paſs ſo, it ſhall as an execution of the power; *quum quod ago, non valet ut ago, valeat quantum valere poteſt* (*c*). 1. *Jones*, 392. *Stapleton's Caſe*. 1. *Ventris*, *King v. Melling*. The caſe of *Gier v. Oſſiter*, 1706, is full in point; and though it be but the opinion of a ſingle Judge at an aſſize, yet it being the opinion of ſo great a man as the late *Lord Chief Juſtice* HOLT, it may be of ſome weight. That caſe was ſhortly thus: A man by will was made tenant for life, with a power to jointure or ſettle upon his wife; and though the conveyance was there, as here, by leaſe and releaſe, yet that Judge was of opinion, that it

* [34]

(*a*) 1. Roll. 329.
(*b*)
(*c*) The caſe of Oſman *v.* Sheaſe, 3. Lev. 372.

was

was a good execution of the power. Now in that caſe, * the ſame objections might have been made as here, and with equal force; for if it be ſaid here, that the eſtate paſſes by virtue of the fine, it may be anſwered, that if a leaſe and releaſe ſhall operate as an execution of the power, and ſignify no more than the declaration of the intention of the parties, then will the appointee be in by virtue of the power in the will, precedent to the fine, and the fine being ſubſequent will ſignify nothing. In the caſe of *Herring v. Brown* (*a*), it was reſolved, that where the fine is precedent to the deed, that there it is an extinguiſhment of the power; but if it had been ſubſequent, as here it is, the power would have been well executed, notwithſtanding the fine; and in the exchequer-chamber it was reſolved to be good, even though the fine were precedent. As for the objection, that the power is to diſpoſe in fee, and executed only in tail, there is nothing in it; more implies leſs. A power to paſs an eſtate in fee is moſt certainly ſufficient for paſſing an eſtate-tail.

POWELL, *Juſtice*. The main queſtion of the caſe is, Whether the power be well executed? A *feoffment* to a man's own ſon ſhall operate as a *covenant to ſtand ſeiſed*, rather than the intention of the parties ſhould be fruſtrated. *Sir Edward Cleer's Caſe* is expreſs, that where it can paſs no other way than by virtue of the power, it ſhall paſs that way, though the intention of the parties were, that it ſhould paſs another. And as for her own eſtate being limited without impeachment of waſte, as to the impeachment of waſte it ſhall be void, becauſe it exceeds the power; the intention of the parties is plain: and he was of opinion for the defendant.

PARKER, *Chief Juſtice*. In *Sir Edward Cleer's Caſe* it was reſolved, that where, according to the way the parties intended, the conveyance would have no effect at all, that there it ſhould paſs another way; but where, * ſhould the eſtate paſs the way the parties intended, the conveyance would have ſome effect, though not all that was intended by the parties, there it ſhould paſs no other way than the parties deſigned. But this point ſince has been carried much farther; as that, where it would have ſome effect, but not all intended by the parties, there, to the end that the main deſign of the parties may be obſerved, the eſtate ſhall paſs in another way than the parties intended. For example: Suppoſe a woman ſeiſed of an eſtate for life, with a power to make a leaſe for three lives, or twenty-one years; ſhe marries; and then ſhe and her huſband join in making the leaſe, and the huſband and wife both die before the leaſe is expired; here, though the huſband in right of his wife, and ſhe in her own, are poſſeſſed of an eſtate for life, and therefore can as owners make a leaſe, and there appears no intention of the parties (imagining perhaps that they ſhould have outlived the leaſe) that this leaſe ſhould be made by virtue of the power; yet becauſe the leaſe, ſuppoſing it made by them as owners, cannot * [36]

(*a*) 1. Vent. 368.

THOMLINSON *againſt* DIGHTON.

have all the effect the parties intended, for ſome it would have, *viz.* it would be a good leaſe during the lives of the huſband and wife, yet becauſe it cannot have all, it ſhall be eſteemed made by virtue of the power: but in the preſent caſe the conveyance, as intended by the parties, would be wholly void.

THE COURT was of opinion for the defendant, and that the judgment in the court of common pleas muſt be affirmed *(a)*.

(*a*) See the judgment of the Court, poſt. 71. And Dormer *v.* Thurland, 2. Peer. Wms. 506. Bramhall *v.* Hall, Amb. 467. Wright *v.* Engleſield, Amb. 468. Darlington *v.* Pulteney, Cowp. 260. Sprange *v.* Barnard, 2. Brown's Caſes Ch. 585.

TRINITY

TRINITY TERM,

The Tenth of Queen Anne,

IN

The Queen's Bench,

AT

The Sittings at The Guildhall of London,

BEFORE

Sir Thomas Parker, *Knt. Chief Juſtice.*

Louviere *againſt* Laubray.

Caſe 26.

AT NISI PRIUS, in the court of queen's bench, *London*, the caſe happened to be this:

If a bill be proteſted for non-payment, and afterwards indorſed to the *drawer*, he may maintain an action as *indorſee*.

Louviere uſed to furniſh *Laubray* with great quantities of ſtockings: *Louviere* drew a bill upon *Laubray*, payable to ſuch a one: *Laubray* accepted the bill, but ſome time after proteſted it. Upon this the bill was indorſed to *Louviere* the drawer, who brought an action as indorſee.

* The queſtion was, Whether *the drawer* of a bill could maintain an action as *indorſee?* * [37]

PARKER, *Chief Juſtice*, was of opinion, that upon evidence given to the Court that there were effects of *Louviere* in the hands of *Laubray* enough to anſwer the bill, and that conſequently the acceptance of the bill was not upon the *honour of the drawer*, the action was well brought. For when a merchant draws a bill upon his correſpondent, who accepts it, this is payment, for it makes him debtor to another perſon, who may bring his action. This therefore is ſuch a payment as may be ſet off upon a former account, and

LOUVIERE *againſt* LAUBRAY.

and pleaded in bar of ſuch an action; but if there were no effects, then the action would not lie; for it would have been an acceptance *upon honour* only, and the money would be recovered only to be recovered again (*a*).

NOTE, Intereſt ruled to be paid from the time of the proteſt (*b*).

(*a*) See Simmonds *v.* Parminter, 1. Wilſ. 185. and Beck *v.* Robley, H. Bl. Rep. 89. *ſatis.*

(*b*) See 2. Burr. 1086. and the caſe of Harris *v.* Benſon, 2. Stra. 910. Auriol *v.* Thomas, 2. Term Rep. 52.

Caſe 27.

Oſway *againſt* Briſtow.

To treſpaſs for taking cows in the plaintiff's cloſe, a plea that they were taken *damage feaſant* in the defendant's cloſe is good, though no title to the land is ſhewn.

AN ACTION OF TRESPASS for taking cows in the plaintiff's cloſe.

The defendant pleaded in bar, that they were *damage feaſant in clauſo ſuo.*

The plaintiff demurred, becauſe he ſet forth no title to the cloſe.

IT WAS RESOLVED that it was well without it; for a poſſeſſory right is ſufficient to maintain an action of treſpaſs. And this difference was taken, That where the defendant juſtifies to a place ſpecially laid down in the declaration, there a title muſt be ſhewn; but where no place is ſpecially laid down, as here there is none, there he need not.

MICHAELMAS TERM,

The Tenth of Queen Anne,

IN

The Court of Chancery.

Sir Simon Harcourt, *Knt. Lord Keeper.*
Sir John Trevor, *Knt. Maſter of the Rolls.*

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* Lingen *againſt* Souroy.

Caſe 28.

A MAN marries a wife worth ſeven hundred pounds, and binds himſelf by marriage-articles to inveſt fourteen hundred pounds in land to ſuch and ſuch uſes, *viz.* to himſelf for life, remainder to the heirs of their bodies begotten, the remainder to his right heirs. The huſband dies, the marriage-articles unperformed, and by his will deviſes a houſe, value fifteen pounds a-year, to the wife, and ninety pounds a-year to his nephews, having no children; then comes the clauſe in his will, "and all my other lands in *York*, or any other part of *Great* "*Britain*, I leave to my nephews."

If a man by marriage-articles agree to inveſt a certain ſum of money in land to the uſe of his wife, and deviſe land to his nephews without having made the inveſtment, the land ſhall paſs to the wife in purſuance of the agreement.

S. C. 2. Eq. Abr. 327. S. C. Gilb. Eq. Rep. 92. S. C. 1. Peer. Wms. 272.

The queſtion was, Whether the fourteen hundred pounds, though not actually inveſted in land, ſhould, notwithſtanding, in equity, be deemed land, ſo as to paſs by the word "land" in the will, ſaving to the wife her intereſt for life? or, Whether it ſhould go with the perſonal eſtate?

The wife being executor contended, that it ſhould be looked upon as perſonal eſtate, becauſe then ſhe ſhould come in for a ſhare in the ſurplus unexhauſted by debts or legacies.

THE COURT did nothing in the affair, but ordered a reference to THE MASTER to ſtate the matters of fact.

But HARCOURT, *Lord Keeper*, declared it to be his preſent opinion, that where there is ſuch a marriage-agreement for ſo much money to be laid out in land, that the money, in caſe the huſband died the agreement unperformed, ſhould, in equity, be eſteemed land,

LINGEN *against* SOUROY.

land, and may be deviſed as ſuch, ſubject, in the firſt place, to the uſes declared in the marriage-ſettlement *(a)*.

(a) See Lingen *v.* Souroy, Gilb. Eq. Rep. 91. S. C. 1. Peer. Wms. 175. Edwards *v.* Warwick, 2. Peer. Wms. 171. Guidot *v.* Guidot, 3. Atk. 254. Pultney *v.* Darlington, 1. Brown's Caſes Ch. 223. Raſhleigh *v.* Maſter, 3. Brown's Caſes Ch. 99. Brown *v.* De Laet, 4. Brown's Caſes Ch. 527.

MICHAELMAS TERM,

The Tenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir Thomas Powys, *Knt.* } *Juſtices.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Robert Raymond, *Knt. Solicitor General.*

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* Rumball *againſt* Ball.

Caſe 29.

ACTION OF DEBT upon a note to this effect: "I ACKNOWLEDGE myſelf indebted to ſuch a one ſo much, "which I promiſe to pay upon demand."

In debt on a note, payable on demand, it is not neceſſary to alledge *a demand* in the declaration.

Dougl. 679. 2. Term Rep. 713.

IT WAS MOVED *in arreſt of judgment*, that though upon a note acknowledging a debt it was not neceſſary to alledge *a demand*; yet where it is part of the agreement, there a demand is neceſſary.

But THE COURT was of another opinion, for it is a debt *in præſenti*; and the words "promiſe to pay" import no more than that I am ready to pay the money at any time, and ſhall not reſtrain or qualify the other words, this being no debt ariſing upon the performance of a certain condition, but a debt plainly precedent to the demand. Beſides, ſuppoſing the demand neceſſary, the action itſelf, perhaps, is a demand.

Harvey

Caſe 30.

* Harvey *againſt* Wright.

If a cauſe has not been proceeded in for four Terms, a whole Term muſt intervene between *the notice* and *the trial*.

Impey, 3d edit. 309.
Stra. 1164.
Sellon's Pract. 407.
3. Term Rep. 530.

THERE was this queſtion raiſed concerning underſtanding a rule of court (*a*).

The rule was, that if a cauſe was not at all proſecuted in four Terms, neither party could revive proceſs, without giving the other a Term's notice.

The queſtion was, Whether notice at any time within the Term, as *e. g.* the laſt day of the Term, would ſatisfy the rule? or, Whether the rule does not require a whole Term's notice?

THE COURT, upon time taken to conſult the reſt of the Judges, that all the courts might be uniform in their practice, delivered their opinion, that by a Term's notice was meant that a whole Term ſhould intervene between notice and trial, that ſo either of the parties may have time and opportunity to apply to this court. In the courts of common pleas and exchequer, where they had the ſame rule in ſo many words, it was ſo underſtood.

(*a*) The rule was made in the fourth year of *Queen Anne*.

Caſe 31.

* Lord Say and Seal's Caſe.

An attorney who is employed in ſuffering a common recovery is not privileged from giving evidence of the day on which the deeds were executed.

~~Bull. N. P. 284. Comp. 845. 2 Stra. 1000. 3 Burr. 1687. 4 Term Rep. 282. 753. 760.~~

UPON A TRIAL AT BAR in the court of king's bench, in an ejectment brought by the heirs at law againſt the *Lord Say and Seal*, who claimed as heir in tail;

The ſingle queſtion was, Whether or no a *common recovery* that was ſuffered in order to dock the intail, was good or not?

The objection to the recovery was, that there was no tenant to the *præcipe*.

To prove the recovery good, a deed bearing date the twenty-third of *October* 1701, directing the uſes of the recovery, and the fine, *viz.* the chirograph of the fine, and common recovery, were produced.

* [41]

THE COUNSEL for the *Lord Say and Seal* deſired to call one *Knight*, an attorney at law, to prove, that though * the deed was dated the twenty-third of *October*, it was not executed until five months after, *viz.* in *March*. *N. B.* The attorney was the perſon intruſted in ſuffering the common recovery.

THE COUNSEL *for the heirs at law* oppoſed the ſwearing the attorney, becauſe as an attorney has a privilege not to be examined as to the ſecrets of his client's cauſe, ſo the attorney's privilege was likewiſe the client's privilege; for the client intruſts an attorney with the ſecrets of his cauſe, upon confidence not only that he will not, but alſo that though he would yet he ſhould not, be admitted by the law to betray his client; and for this *Holbeche's Caſe*

Caſe (*a*) was relied upon. Beſides, it was ſaid that his evidence would tend to accuſe himſelf either of ignorance, negligence, or ſomething worſe; and in *Moore's Reports*, antedating deeds is felony.

LORD SAY AND SEAL'S CASE.

THE COURT were of opinion, that *Holbeche's Caſe* was good law; and that an attorney's privilege was the privilege of his client; and that an attorney, though he would yet ſhould not be allowed to diſcover the ſecrets of his client (*b*). But notwithſtanding this, they thought *Knight*'s evidence was to be received; for that a thing of ſuch a nature as the time of executing a deed could not be called the ſecret of his client, that it was a thing he might come to the knowledge of without his client's acquainting him, and was of that nature, that an attorney concerned, or anybody elſe, might inform the Court of (*c*).

Knight being called in, ſwore, that it being feared the common recovery would be good for nothing, becauſe it was doubted whether there was a good tenant to the *præcipe*, at the time of the common recovery ſuffered, it was agreed upon as the beſt expedient, that there ſhould be a fine as of *Sancti Michaelis* levied to make a tenant to the *præcipe*, which was five months before the * fine was actually levied; and that there ſhould be a deed, which ſhould declare the uſes of the fine and recovery, and recite the fine to be of *Sancti Michaelis*; and that the deed was executed when the fine was taken, *viz.* in *March*.

Parol evidence ſhall not be admitted to contradict the chirograph of a fine.

1. Mod. 117. 2. Stra. 1267.

* [42]

The *chirograph* of the fine was then produced, according to which the fine was levied as of *Michaelmas Term*; and if ſo, without controverſy there was a tenant to the *præcipe*, and ſo all was well.

THE COUNSEL for *Lord Say* confeſſed, that the chirograph of a fine was *prima facie* good evidence; that it was an evidence of ſo high a nature, as that no parol evidence ſhould be allowed to falſify it; but they ſaid it might by matter of record. To clear the way, they mentioned the clauſe in the ſtatute 5. *Hen.* 4. No. 28. that orders the enrolment of fines, and that of 23. *Eliz.* c. 3. which directs, that the date of the concord ſhould be certified by the Judge before whom the fine was levied.

See Cruiſe on Fines, 43.

Then they ſaid, that *the concord* of the fine was certified by *Lord Chief Juſtice* TREVOR to be taken upon the ſecond day of *March*; and this evidence being an evidence of record, they offered to falſify *the chirograph*.

BUT TO THIS *it was objected*, that the chirograph of a fine was a record of ſo high a nature, that unleſs it be void, and not only voidable, it cannot be vacated by any evidence whatſoever, but by

(*a*)

(*b*) Lindſay *v.* Talbot, Bull. N. P. 284.

(*c*) See Doe *v.* Andrews, Cowp. 845. Rex *v.* Dixon, 3. Burr. 1687. Cobden *v.* Kendrick, 4. Term Rep. 431. Wilſon *v.* Raſtal, 4. Term Rep. 753. 2 Str. 1122.

writ

LORD SAY AND SEAL'S CASE.

writ of error only. And that it was not a nullity and void, they cited 2. *Ventris*, 47. and *Hobart*, 330. where *A.* and his wife acknowledged the note of a fine the twenty-ſixth day of *March*, before commiſſioners, by *dedimus poteſtatem*; the wife died the twenty-ſeventh of the ſame month; the twenty-eighth compoſition was made in the alienation-office, upon a writ of covenant returnable in *Hilary Term* before, and the king's ſilver was entered as of
* [43] the ſame *Hilary Term*; and * this fine, upon debate, was reſolved to be good. In the caſe of *Argenton v. Weſtover* (*a*), where it appeared by the record, that the caption of the conuzance of the fine was the twenty-ſeventh of *March*, and the writ of covenant and *dedimus poteſtatem* were dated the ninth of *April*, and it was, in a writ of error to reverſe the fine, objected, that the conuzance was taken without any warrant, and that by 23. *Eliz.* c. 3. the caption was always to be certified, the Court over-ruled this exception, and would not hear it argued, becauſe it would ſhake ſeveral fines, &c. And it is a common practice, that a fine levied in the Vacation may, at the choice of the parties, be a fine of either the precedent or ſubſequent Terms, which differs from the caſe at bar only in this, that here there is an intervening Term; and whether this will occaſion ſuch a difference, as that in the one caſe the fine ſhould be good, in the other not only voidable but void and null, depends upon the practice of the court of common pleas, where this matter ſhould properly have been canvaſſed. Though a fine preſuppoſes a writ of covenant, yet the common practice is now to levy them without. The caſe of *Clerk v. Ward* (*b*) was the only caſe where a fine was attempted to be deſtroyed by evidence, and this was in a court of equity, *viz.* the chancery, and yet there it was not ſuffered; and this opinion was confirmed upon error in the houſe of lords. As for the ſtatute of 23. *Eliz.* c. 2. it only extends to fines taken by *dedimus*, and only to regulate not annul fines, as the clauſe (*c*) of "any attornment, &c." ſhews, for *exceptio probat regulam in rebus non exceptis*. The ſtatute *De Donis* ſays, that "ſuch fines ſhall be *ipſo jure* null;" yet this has been interpreted voidable only: and a diſcontinuance outlawry is ſaid by an act of parliament to be *ipſo facto* void, and yet it has been held voidable only by writ of error; and if this conſtruction prevails in an outlawry penal in its nature, *à fortiori* it ought in things ſo much favoured as fines.

* [44] * THE COUNSEL *for Lord Say* contended the fine to be void by 23. *Eliz.* c. 3.; for if it be interpreted to make fines voidable only, it will help none but thoſe that are intitled to a writ of error, and not remainder-men, who are not ſo; ſo that, according to this conſtruction, the act will relieve but half of thoſe it was deſigned to relieve.

(*a*) Cro. Eliz. 275.
(*b*) Prec. Chan. 150. 1. Bro. Caſes in Parl. 137.
(*c*) 23. *Eliz.* c. 3. ſ. 5.

PEERE

Lord Say and Seal's Case.

Peere Williams *for the plaintiffs*, the heirs at law, replied to this, that there might be found ſome caſes in law, where the party grieved was without remedy; and inſtanced in the caſe of bail, who, though as much grieved by an erroneous judgment as the principal himſelf, can yet bring no writ of error to reverſe it.

The Court. It is very harſh doctrine to be laid down in a court of juſtice, that there may be a wrong without a remedy; eſpecially when the preſent caſe requires no ſuch argument; for if *Lord Say* ſhould be wronged by our refuſal of this evidence, he has yet a very proper and eaſy remedy, *viz.* to apply to the court of common pleas to vacate the fine, if in truth it be voidable. It is agreed, by both ſides, that it is common practice for a fine levied in Vacation-time to be, at the election of the parties, a fine either of the precedent or ſubſequent Terms, but according to this doctrine it muſt be a mere nullity. Whether the intervening of a Term can make ſuch a difference, as that in the one caſe the fine ſhall be good, in the other utterly void, cannot be diſcovered from the reaſon of the thing, but muſt depend entirely upon the practice of the court of common pleas; and every court being judge of its own rules, is a plain argument that that is the proper court to relieve. In the caſe of *Clerk v. Ward* (*a*), ſuch kind of evidence was refuſed even by a court of equity, *viz.* the chancery; and this judgment was confirmed on a writ of error in the houſe of lords.
* As for the acts of parliament mentioned, it ſeems unreaſonable * [45]
to put ſuch a conſtruction upon them, as that more exceptions ſhould make fines null ſince thoſe ſtatutes, which were deſigned to protect and ſupport them, than before. Beſides, theſe ſtatutes extend only to fines taken by *dedimus*; and though now moſt fines are in fact taken ſo, yet they are recorded as taken in court, and this to prevent queſtions about captions. This caſe is not to be diſtinguiſhed, in the reaſon of the thing, from the caſe of a warrant of attorney to confeſs judgment, and before judgment confeſſed the party dies, and judgment is confeſſed after his death, in which caſe the judgment can be avoided by error only. While a fine remains a record, intire credit muſt be given to it. Beſides, this evidence, if allowed, will not be concluſive; for it will not follow, that, if there be a caption returned ſuch a day, there was no other taken before; for there may be twenty captions, there may perhaps be another fine really had. If a caption and covenant were of the eſſence of a fine, they ought to be given in evidence to próve a fine, but this is never done. Common recoveries, although there are no tenants to the *præcipes*, are good by way of *eſtoppels* againſt the parties who ſuffer them, though not againſt remainder-men, ſtrangers, &c.

(*a*) Prec. Ch. 150. 2. Eq. Abr. 474. 1. Brown C. P. 137.

A deed of bargain and sale made thus: "THIS INDENTURE, "made between *A.* of "the one part, "*B.* of the second part, and "*C.* of the third "part, witnesseth, that for "and in consideration of "five shillings "in hand paid, "*hath* granted, "&c." is good, although the name of *the grantor* is omitted before the words "hath "granted, &c."

After this, there was a deed of *bargain and sale* inrolled produced, which would have made a good tenant to the *præcipe* had the opinion of the Court been against the plaintiffs, as it was for them.

But to this deed this objection was made, that it was a tripartite deed, and ran to this effect: "THIS INDENTURE, made the "day of , between of "the one part, and of the second part, and "of the third part, witnesseth, That for and in "consideration * of the sum of five shillings, to him in hand paid, "hath given and granted, &c." Now here they said the person granting is wanting, "hath granted," without saying who hath granted, and consequently this deed passes nothing, and can therefore make no tenant to the *præcipe*. By way of enforcing this objection it was said, that to make a good deed proper words are requisite; there must be *a grantor* and *a grantee*; and it is not for a court of law to spell out the intention of the parties. If the failure had been of a grantee as it was of a grantor, for example, thus, "IN CONSIDERATION of five shillings paid by *A.* that therefore "*Lord Say* did grant," without saying to whom, nothing most certainly would have passed, where yet the presumption would have been full as strong; and *Hastlewood's Case* (*a*) was much relied upon. If the construction of a deed is always to be governed by the intention of the parties, a grant of land to a man "for ever" would convey a fee; and a "grant to a man and his issue" an estate-tail, as well as in a will.

See Trethewy v Elledon 2 Vent 141 - Spire v Tipham 3 Cast IN. Langdon v Goole 3 Lev. 21 -

THE COUNSEL *for the plaintiff* replied, that it was not a thing to be doubted but there must be *a grantor* and *a grantee*; but the question was, Whether, though this deed be not as exact in form as it might have been, yet a grantor may not with certainty enough be collected from the whole deed? As to *Hastlewood's Case*, VENTRIS was against the judgment; besides, that was a case upon pleading, where forms are more strictly required and adhered to than in deeds; and the case of *Trethewy v. Ellesdon* (*b*) is clear contrary. In the case of *Beniger v. Forgassa* (*c*), there is a collection of cases where names shall be supplied. It is a maxim of law, that a deed shall never be construed void if it can by any means be made good: and what the intent of this deed was, and that * according to that *Lord Say* was grantor, was proved beyond dispute from several parts of the deed. In the case of *Langdon v. Goole* (*d*), a man was bound in an obligation, but it was not said to whom, yet this was supplied by the intention. The case of *Stanhope v. Buller* (*e*) was a case even in pleading. The law will, as much as it can, assist the frailties and infirmities of men in their employments, who, in drawing long deeds, may easily make a slip. The case at bar is the case of a bargain and sale,

* [47]

(*a*) 2. Vent. 196.
(*b*) 2. Vent 141.
(*c*) Plowd. Com.
(*d*) 3. Lev. 41.
(*e*) 1. Lutw. 233.

where

where the conſideration of money carries ſo violent an intendment; that a grant to a man upon a valuable conſideration, without ſaying "for his heirs," ſhall yet give him a fee; which is much ſtronger than the caſe at bar; becauſe there without ſuch a conſtruction there would have been a *quid pro quo*, an eſtate for life, and the grant would not be altogether void, as here it would. LORD SAY AND SEAL'S CASE.

THE COURT was of opinion, that the deed was good. Had this been a tripartite deed, without this ſlip, there had been no doubt at all in the caſe; but the deed is tripartite, and "hath" in the ſingular number, and therefore all the doubt is to whom the "hath" refers. Deeds are to be interpreted, as much as poſſible, according to the intention of the parties. The caſe of *Haſlewood v. Manſfield (a)* was a caſe upon pleading, where greater ſtrictneſs is required, and therefore does not come up to the caſe in point. The caſe of *Trethewy v. Elleſdon (b)* does. Many are the inſtances where the penalties of bonds are put into very ſtrange and even falſe *Latin*, and yet held good *(c)*. The caſe in queſtion is the caſe of a bargain and ſale, and therefore to be interpreted more favourably than a deed. By the common law, nothing paſſed by deed of bargain and ſale but the uſe, and the remedy was only in chancery; but now ſtatute-law has paſſed the eſtate to the uſe. The intention of the deed is plain, if this deed do not make *Lord Say* grantor, as to him it would have no effect at all, who yet ſealed it. According to the common rules of indenture, the * words of the deed are the words of all the parties, but *Lord Say* is a party, therefore he has granted. * [48]

The truth of the matter was, that it being feared this ſlip in the deed would be fatal to the recovery, this other contrivance of the fine was judged to be the beſt way of ſupporting it.

Though THE OPINION OF THE COURT was clear and plain for the plaintiffs in both points, yet the *Lord Say and Seal* prayed a bill of exceptions.

(a) 2. Vent. 196.
(b) 2. Vent. 141.
(c) See 1. Salk. 462. 3. Salk. 74.

The Queen *againſt* Sir Gilbert Heathcote, Lord-Mayor of London. Caſe 32.

THE COURT OF QUEEN'S BENCH was moved for a *mandamus* to be directed to *Sir Gilbert Heathcote*, late LORD-MAYOR of the city of *London*, to return ſuch and ſuch perſons, by name, to the court of aldermen, as the perſons choſen by the wardmote of *Broad-Street*, or to ſhew cauſe why he would not. *Sir Gilbert Heathcote* had in fact made a return, but a return of different perſons (as to three

By the cuſtom of *London*, each of the wardmotes is to return four perſons to the court of aldermen, out of which the court is to chuſe one for alderman of the ward; but if four be choſen at a wardmote, and four other perſons returned, the court of king's bench will not grant *a mandamus* to the returning officer to return the four who were elected, but will leave the parties injured to bring an action on the caſe for a falſe return.—S. C. Fort. 283. Salk. 670.

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of them) than what (the Counſel moving ſaid) appeared upon the ſcrutiny to have been really choſen.

ARGUMENTS *for the mandamus.*

It was ſaid, that they were before a court that had a juriſdiction over all inferior magiſtrates whatſoever, to compel them to do their duty; that as it would without doubt be proper to apply to this court, ſhould a lord-mayor refuſe to hold a court of aldermen, or refuſe to make any return, ſo it was no leſs proper in the preſent caſe, where he makes a falſe one. If it be objected, that the proper remedy lies in the court of aldermen, the anſwer is, that the lord-
* [49] mayor preſides over that court, *et nemo debet eſſe * judex in propriâ cauſâ*; and though it may here be ſaid, that the lord-mayor who made the return is out of his office, yet this in general muſt be precarious and uncertain; it might have been otherwiſe; and a legal remedy ought to be certain in all events. If the court of aldermen are the final electors, and have alſo a power of allowing or diſallowing returns, they will have an abſolute power of chooſing whom they pleaſe; whereas, according to the ancient cuſtom and practice, they are only to chooſe one of the perſons returned to them. It is true, the court of aldermen have rejected returns, upon the account of the inſufficiency of the perſons returned; or where the return has either fallen ſhort, or exceeded the juſt number, as when five or three have been returned; but not becauſe of its being a falſe return. But ſuppoſing the court of aldermen have a juriſdiction, why may not this court have a concurrent one? It was confeſſed, that this was an unprecedented *mandamus* that was deſired; but then it was ſaid, the reaſon was, becauſe no lord-mayor before had ever made ſo bold an attempt upon the liberties and privileges of THE CITY; and as there was no precedent for the *mandamus* deſired, ſo there was no inſtance to be found in which ſuch a *mandamus* had been denied. Then ſeveral caſes were quoted (*a*), where the Court, though doubtful whether a *mandamus* lay, had yet granted a *mandamus*, in order to conſider further upon the return. And if the Court will act ſo in caſes, comparatively ſpeaking, of a private nature, much more will they do ſo in offices of a public nature, as that of an alderman of the city of *London*.

ARGUMENTS *againſt the mandamus.*

FIRST, It was ſaid, that the cuſtom, generally, was for the perſon injured to pray for a *mandamus*, and the words of the writ
* [50] are "*ad damnum* of thoſe that are choſen;" * whereas in this caſe, the Counſel moving for the *mandamus* are Counſel for THE CITY.

THEN it was inſiſted upon, that there was no occaſion for this *mandamus*, for that the lord-mayor was only a miniſterial officer, and the court of aldermen were not concluded by this his return. By the cuſtom of the city, founded upon the bye-law of *Henry the*

(*a*) 1. Lev. 121. Duke of Ormond's Caſe. Dr. Blithe's Caſe.

Fourth,

Fourth, they are to chuſe one of the perſons choſen, not one of thoſe returned.—To prove the authority and power of the court of aldermen over returns, the following inſtances were produced: On the ſecond day of *November*, in the year 1696, *Sir John Moor* was returned two ſeveral times to the court of aldermen, and as often rejected; and the court of aldermen proceeded to a new election themſelves, without any more returns; on the thirteenth day of *July*, in the year 1699, they ordered a new return to be made for *divers reaſons* only, not ſaying what; and on the thirtieth day of *January*, in the year 1694, a new return was commanded for diſorderly proceedings. In the *Caſe of Queenhithe*, the record ſays, "*ideo conſideratum eſt per Curiam*," that this return be rejected; and when five or three have been returned, the court of aldermen have rejected them. If now, ſuch an over-ruling power has been exerciſed over returns by the court of aldermen, this court will not, certainly, interpoſe, and deprive the court of aldermen of their right in this matter. The common reaſon why *mandamus's* concerning fellows of colleges have been refuſed, *viz.* becauſe their proper remedy was to apply to the viſitor, will hold in this caſe. But ſuppoſing the return did conclude the court of aldermen, yet the Court will never grant a *mandamus* in this caſe, becauſe four are already returned. Should the Court direct a *mandamus* for four more to be returned, ſuch a command would make the lord-mayor ſubject to actions upon the caſe for falſe returns; for one return muſt neceſſarily falſify the other, it being impoſſible that both can be true. * Suppoſe *Sir Gilbert Heathcote*, in obedience to ſuch a *mandamus*, returns another four, the conſequence is, the court of aldermen will have two returns before them; and either they have a right to examine which was the true return, or they have not; if they have not, they can do nothing; if they have, then they may now examine into this preſent return, and reject it if they ſee cauſe. Acceptance is neceſſary to a return, and this return being already complete, by acceptance of the court of aldermen, another cannot now be made.

*[51]

EYRE, *Juſtice*, propoſed an objection to this *mandamus* for the conſideration of the Counſel. The objection was, that no inſtance could be produced where obedience to a *mandamus* ſhall expoſe a man to any trouble or inconvenience; whereas in this caſe, if *Sir Gilbert Heathcote* obeys the *mandamus*, he will be liable to an action for a falſe return to the court of aldermen; but if he returns, that the perſons already returned are thoſe that were truly choſen, he will be liable to an action for a falſe return to the *mandamus*, and afterwards to an action for a falſe return to the court of aldermen; for the one action and verdict cannot be given in evidence in the other action.

THE COUNSEL *for the mandamus* replied.—As for that objection againſt the *mandamus*, that the court of aldermen had a power over the return, and that therefore this Court ought not to interpoſe, any

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more than they will in the case of a fellow of a college, where there is A VISITOR, they said, the difference taken in the famous case of *Dr. Bury, Bishop of Exeter*, which passed the house of lords, would answer that objection, *viz.* that as to such corporations as were erected for private ends only, the Court would leave these to visitors, and not interpose, as in the case of colleges, &c.; *contra* as to corporations founded upon public
* [52] accounts, as for the government of great cities, * &c.; and in the case at bar, the metropolis of the whole kingdom was concerned. They said, it was very unreasonable that the court of aldermen should have an absolute power over returns, and be final electors too; for then, in effect, they have the entire election in themselves, and the liberties of the city are precarious, depending upon the pleasure of the court of aldermen. As for the instances produced, of the power of the court of aldermen over returns, five of them only were insisted upon, and in some of them the returns carried along with them evident marks of error, as where three or five were returned. The rest were instances of such nature as would make one sorry that such a power should be placed in such a court, if so it is, as where they rejected a return "for divers reasons," and another "for disorderly proceedings."

To the objection, that the power of the lord-mayor was already executed, and the return made, it was answered, that the force of this objection only amounted to this, that an officer, because he has done wrong, must not do right; that the first return, if wrong, was a nullity, and no return at all; that this would be an objection against all *mandamus's*; and that by this rule an archdeacon might return to a *mandamus*, that he had sworn in such a one, that his power was executed, and therefore he could not obey the *mandamus*.

To the objection, that this *mandamus* would expose *Sir Gilbert Heathcote* to actions, whether he obeyed it or made a return to it, in which it differed from all other *mandamus's*, it was answered, that if he obeyed the *mandamus*, as he ought if he has already done wrong, that it was his doing wrong, and not his obedience to the *mandamus*, that exposed him to actions; that if he had done right, in case of disobedience to the *mandamus* no action could be successfully brought against him; for that, in these commandatory writs,
* [53] there is always an alternative; * "*si ita est*," says one; "*si vobis* "*constare poterit*," says another; and this writ now in debate, "*vel causam nobis significes*;" in all which cases, the first part of the writ is only to be obeyed if true. Some special cases there are wherein officers may be liable to actions merely for executing the process of the law; but in no case can an action be carried on successfully, in case he has behaved impartially. For example, upon a *fieri facias* directed to a sheriff, put the case there are goods in which, as it often happens, others claim a property; in this case, whether he returns "*fieri feci*" or "*nulla bona*," and one he must, he will be liable to an action. But if it shall appear that

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that he has acted fairly and indifferently, the law ſhall ſecure him, whatever return he makes, and whether his return be true or falſe. Bonds taken by a ſheriff to indemnify him, in ſuch a caſe, have been held good.

As to that part of the objection, that this diſtinguiſhes this caſe from all other *mandamus's*; they ſuppoſed the law to be otherwiſe, and that ſhould an archdeacon, in obedience to a *mandamus*, ſwear in a wrong perſon, he would be liable to an action. 1. *Rolls*, 108. was cited, where it was ſaid, that an action lay againſt an archdeacon for not inducting a clerk. Inſtances were urged, wherein the Court, though doubtful, granted *mandamus's*; and it was ſaid that they were better ſpoken to, and with more certainty upon the return.

Mandamus's founded upon MAGNA CHARTA, *cap.* 29.

The laſt day of the Term, THE COURT, *viz.* the THREE JUDGES then preſent, delivered their opinions *ſeriatim* to the following effect.

EYRE, *Juſtice.* The queſtion is, Whether the Court ought to grant the *mandamus* deſired? The deſign in aſking it, is ſaid to be not ſo much for the ſake of deciding the * preſent controverſy, as to know what remedy the inhabitants of *a ward* have, to be repreſented by one of the four truly choſen by them, in the court of aldermen. It is agreed, that the wardmote are to chooſe four and return them to the court of aldermen; and that the court of aldermen are to be the final electors, for they are to chooſe one of the four. It is agreed, the court of aldermen have quaſhed returns; ſometimes for the number and inſufficiency of the perſons returned, ſometimes for irregularities in the choice. It muſt likewiſe be agreed, that this Court has a general juriſdiction in this matter, and is to take care, that public offices be diſcharged by perſons that are duly elected; and that *mandamus's* have been the way whereby this power has been generally executed. I agree, therefore, that unleſs ſome *mandamus*, I ſay ſome *mandamus*, will lie in this caſe, there is no remedy; for as for actions upon the caſe for falſe returns, they lie only in damages, but can never reſtore the perſons wronged to the poſſeſſion of their right. It ought to be the concern of a court of juſtice to take care, that whilſt they are granting a remedy to one, they do not at the ſame time expoſe others to great inconveniencies; and likewiſe, that the remedy be ſuch, as may prove effectual. *Bagg's Caſe* (*a*), and the laſt *Mandamus Act* (*b*), do not concern the preſent queſtion; for the former treats of *mandamus's* in general, and the latter only ſpeeds the proceedings upon *mandamus's*, but does not give any new *mandamus*. It is confeſſed of all hands, that the *mandamus* deſired is without a precedent; all *mandamus's* being either to reſtore perſons turned out, or to admit thoſe refuſed. I ſay not this, by

* [54]

(*a*) 11. Co. 93.

(*b*) 9. *Ann.* c. 20.

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way of objection againſt the *mandamus*; but only to ſhew, that the reaſon of other caſes muſt be our guide. The caſes quoted have been of *mandamus's* to archdeacons to ſwear in church-wardens, or to corporations to admit burgeſſes; but theſe caſes cannot warrant * this *mandamus*, becauſe this is *a mandamus* liable to greater inconveniencies, and leſs effectual than either of thoſe; for an archdeacon is perfectly ſafe in obeying *a mandamus* directed to him: but here in the caſe before us, obedience to this *mandamus*, ſuppoſing him to have done right already, will be no defence in an action upon the caſe for a falſe return, for it would be of very dangerous conſequence that it ſhould: for, firſt, the perſons being named in the *mandamus*, is no evidence of their being choſen, but is barely the ſuggeſtion of the party; and, ſecondly, the conſequence would be, that the perſon who ſhould be ſo diligent or fortunate as to get the firſt *mandamus*, whether choſen or not choſen, could not be removed. Though no caſe has been quoted to ſhew, and the reaſon I am ſure is becauſe there are none, that an archdeacon ſwearing in a wrong perſon, in obedience to a *mandamus*, was liable to an action for ſo doing; yet it has been attempted to be proved, that in the reaſon of the thing an action ought to lie; and for this purpoſe it has been ſaid, that an action will lie againſt an archdeacon for not admitting, or refuſing to ſwear in, &c. But certainly it does not from hence follow, that obedience to a mandatory writ of this court will ſubject him to an action. Further yet, this *mandamus* may poſſibly expoſe *Sir Gilbert Heathcote* to a double vexation. Suppoſe he returns that the perſons before returned were truly choſen, he will be liable to an action for a falſe return to the *mandamus*, and likewiſe to an action for a falſe return to the court of aldermen, for the evidence given in one action will not be evidence in the other. This objection receives an additional ſtrength from the late *Mandamus Act*, where there is a ſpecial clauſe to ſecure men from double vexation. But the greateſt objection againſt this *mandamus* is, that it muſt prove vain and fruitleſs; whereas in all other caſes the *mandamus* is an immediate and effectual remedy; for the court of aldermen cannot be bound * by the proceedings upon this *mandamus*, being ſtrangers to it; and conſequently, according to the verdict given upon the trial in a ſecond *mandamus* to the court of aldermen, and without any regard to the trial, proceedings, and verdict upon the firſt *mandamus*, it is, that the *peremptory mandamus* muſt go, ſo that to me it ſeems to have no effect at all. It is highly proper there ſhould be a remedy; but for theſe reaſons I cannot think this a proper remedy. The *Abingdon Caſe*, as appears to me, points out the *mandamus* that ought to go in this caſe. By the conſtitution of that corporation the freemen were to chooſe two, and preſent them to the mayor, aldermen, and burgeſſes, who were to elect one of them: Now in this caſe there was a *mandamus* granted to the mayor, aldermen, and burgeſſes, ſuggeſting that ſuch a one and ſuch a one were the perſons choſen, and commanding them to chooſe one of them. That the court of aldermen are to elect one of the four, choſen

* [55]

* [56]

choſen by the wardmote, and not one of them returned by the lord mayor, is very plain from the power by them exerciſed over returns. Now, therefore, as it appears to me, we ſhould grant a *mandamus* to the court of aldermen, ſuggeſting ſuch four to be choſen, and commanding them to chooſe one of them. This ſeems to me not liable to thoſe objections and inconveniencies the other way is attended with, and alſo anſwers that objection rationally ſtarted, that they are in truth the ſole electors. Beſides, ſuppoſing the court of aldermen have, as is pretended, ſuch a power over returns, they are the propereſt perſons to return their own privileges. As to the objection, that the lord mayor preſides in the court of aldermen, and, having a power to adjourn the court at pleaſure, may prevent any return ungrateful to him; the anſwer is, that in ſo doing he would be guilty of a contempt; and ſo would the court of aldermen, ſhould they refuſe to obey, or return to the *mandamus*.

* POWYS, *Juſtice*. I am of opinion this *mandamus* ought to go. *Bagg's Caſe (a)* is ſaid to have been the beginning of *mandamus's*; but certainly they are of much greater antiquity. In *Dr. Widdrington's Caſe (b)* they are ſaid to have been as old as the time of *Edward the Second* and *Edward the Third*. There have been poſitive affidavits read of miſbehaviour, which is ground enough for us to look into it. My BROTHER EYRE has owned, that there is no way of coming at this matter but by a *mandamus*. I cannot ſee of what uſe a *mandamus* directed to the court of aldermen would be; for they can do nothing upon ſuch a *mandamus*; the perſons not coming before them in a legal way, *viz.* by the return of the lord mayor. Beſides, to grant a *mandamus* at firſt to the court of aldermen, would be to proceed *per ſaltum*, neglecting the proper degrees to be obſerved in this matter. But it is objected, that an application to the court of aldermen is the proper remedy: I anſwer no; for that would be to appeal from the lord mayor to the lord mayor, for he preſides in that court, and can hold or adjourn it at pleaſure. It is out of that court the lord mayor is choſen, and as every member there lives in expectation of the chair in his turn, that court will conſider the privileges of the lord mayor as their own. It ſeems very unreaſonable that the ſame body of men ſhould be to chooſe out of the return, and have an abſolute power over the return too. There have, indeed, been inſtances produced of their power over returns, ſome of which did not come up to the point; and one was of ſo arbitrary a nature, as was never before practiſed, nor I hope ever will again. It is objected, that *Sir Gilbert Heathcote* has already executed his power, and would you have him do it over again? A ſtrange objection, where an officer's having done wrong, is uſed as an argument againſt his being obliged to do juſtice! * Suppoſe mere ſtrangers had been returned; muſt this have been looked upon as an exerciſe of his power? No certainly; a falſe return is no return. Would it be

* [57]

* [58]

(*a*) 11. Co. 93. (*b*) 2. Lev. 23.

a good

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a good return for an archdeacon to ſay, "I have already ſworn in a wrong church-warden, therefore I cannot obey the writ?" No, it would not. *Mandamus's* are never peremptory; but have always a disjunctive, "*vel cauſam nobis ſignifices.*" If he has made a return, and a true return, he may return *non electi*; but if theſe men are really choſen, it is abſolutely neceſſary for them to be returned; ſince that is the only legal way by which they can be brought before the court of aldermen. It is objected, that this *mandamus* will be ineffectual: I ſay no; for it will have its proper effect; which is not that theſe men ſhould be aldermen, but put in a capacity of being ſo, by being returned. As to *Sir Gilbert Heathcote's* being expoſed to actions, nay to double vexation, that is not to be put in the ſcales with the peace and quiet of the City. In the next place, no action can be brought againſt him ſucceſsfully, in caſe he has done right. And in caſe of double vexation, the damages a jury would give upon ſuch a ſecond trial, after the merits had been fairly tried before, would be inconſiderable. But it is objected, that the *mandamus* deſired, differs from all others; they being either to admit or reſtore, but this for a poſſibility only: I ſay not; for it is for a nomination. Thus much of the *mandamus's* lying *de jure*. But now ſuppoſing it doubtful, yet I think we ought to grant it. Many are the inſtances where this Court have granted *mandamus's* in doubtful caſes; as to the treaſurer of the *New River* water (*a*), to fellow of a college (*b*). All caſes of *mandamus's* are granted *hæſitante curiâ* (*c*); and the ground they went upon was this, that it would be better ſpoken to upon the return. Now, if this Court has acted thus, in matters of an inferior nature; *à fortiori* will it do ſo in a caſe of * this importance. The return of *Sir Gilbert Heathcote* may give ſome further light in the matter: if we ſhould err in granting this *mandamus*, the error is retrievable; it may be quaſhed, *erronicè emanavit*. But ſuppoſing there is another remedy, that is no objection; for the law in many caſes gives a double remedy: as ſuppoſe a clauſe in a will, that whatever controverſy ſhall ariſe upon the conſtruction of it, ſhall be decided by ſuch and ſuch arbitrators; the parties will have their election to decide their controverſies either by arbitrators, or by law.

* [59]

PARKER, *Chief Juſtice.* This being a caſe of conſequence, I ſhall not only give my opinion, but freely declare that which ſeems to me the beſt and propereſt remedy in this affair. Among the inſtances produced, to prove the power of the court of aldermen over returns, one was their rejecting a return, becauſe the lord mayor, *Sir Samuel Garrard*, had refuſed a poll. This, I ſuppoſe, they did upon a complaint brought before them; which ſeems to me, in this caſe, the moſt proper remedy. The effect of this *mandamus* is, to have ſuch and ſuch returned; the conſequence of which will be, the court of aldermen will have ſeven before them; and then they muſt conſider who the four were that were choſen by

(*a*) 1. Sid. 165. (*b*) 1. Lev. 23. (*c*) 2. Lev. 14.

the

the wardmote, that ſo they may chooſe one of them: for unleſs they do this, there muſt go another *mandamus* to the court of aldermen; the conſequence of which is, that this election may come to be tried twice, *viz.* upon the return of *Sir Gilbert Heathcote* to his *mandamus*, and of the court of aldermen to theirs; ſo that this way the right may not, poſſibly, be ſettled without much expence and length of time. When perſons are falſly returned, the proper way is, for the perſons grieved to complain to the court of aldermen for redreſs; and if they refuſe, then this Court will grant a *mandamus* to the court of aldermen, * who are the propereſt perſons to return their own privileges. As for the *mandamus* deſired, two things are to be conſidered: Firſt, Whether it lies? Secondly, Whether it ought to be granted, in caſe it be doubtful whether it lies, or not? As to what has been ſaid concerning the juriſdiction of this Court, that is out of diſpute. But though a court has juriſdiction, yet it ought not to be exerted but where it is neceſſary; and if the court of aldermen are to chooſe one of the four elected by the wardmote, and not returned by the lord mayor, then ſure I am that this *mandamus* cannot be neceſſary; for then it will be juſt the ſame thing, whether the perſons choſen come before the court of aldermen, by way of complaint, or by the return of the lord mayor, in obedience to this *mandamus*. As this *mandamus* is unneceſſary, ſo will it be ineffectual; for the end of it is only to bring the perſons choſen before the court of aldermen, which may be done as well by complaint of the perſons injured. And after this *mandamus* granted, the aldermen muſt do juſt the ſame thing they are bound to do now upon complaint, *viz.* conſider which are the perſons choſen by the wardmote. The darkneſs complained of in the ſcrutiny, only prevents that examination, which upon a complaint may be had. One difference there is between proceeding by complaint and *mandamus*, that the former is more compendious and leſs expenſive. Now, as to the perſons that may be affected by this way of proceeding: to begin with the court of aldermen; they will be under a neceſſity of returning their own privileges to a *mandamus*, conſequent of this now aſked; or, no means being left them to know which were truly choſen, of obeying the writ blindly, without knowing whether they do wrong or right. * As for *Sir Gilbert*, if he obey the writ, he is ſubject to an action for a falſe return to the court of aldermen; and no inſtance yet has been produced, where obedience to a mandatory writ of this court expoſes a man to an action. If he return "*non* "*electi*," he is liable to an action upon both returns. Actions have indeed been brought againſt an archdeacon for refuſing, but never, as my BROTHER EYRE has obſerved, for paying obedience to a mandatory writ of this court. It has been objected, there are ſome caſes, wherein perſons by merely executing the proceſs of the law may become ſubject to actions; but ſurely, ſuch a conſequence is a very good reaſon for not giving way to an unprecedented proceſs, unleſs otherwiſe there would be a failure of juſtice. It has been objected, that it is highly unreaſonable for the ſame perſons

* [60]

* [61]

to

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to be judges of the goodneſs of the return, and to chooſe one of them too: I anſwer it is unreaſonable, that they ſhould be at liberty to take which four they pleaſe, but not at all, that they may conſider which of the parties were really elected. It does by no means follow, that becauſe they are the final electors, that therefore they are the proper judges to do right, and judge which four were duly elected; and if they do wrong, then is the proper time for this Court to interpoſe by granting *a mandamus*. Indeed it has been ſaid, that *a mandamus* will not lie, in the firſt place, to the court of aldermen; that the aldermen have no authority but upon the return of the lord mayor, and conſequently that *a mandamus* to the court of aldermen can be of no uſe, unleſs it be ſubſequent to the *mandamus* to *Sir Gilbert Heathcote*: this objection ſuppoſes the court of aldermen concluded by the return of the lord mayor; and if this be ſo, then there is no way to let theſe perſons into their right, but by ſetting aſide the return already made; which cannot be done * by *mandamus*, but by *action of deceipt* only. Even in the caſe of a ſheriff, where the return is into our own court, there is no way of doing it but by an action of deceipt; much leſs can it be done in the caſe of a return to a foreign court. If this be ſo, the *mandamus* will ſignify nothing; for the court of aldermen will be concluded by the firſt return. I was once conſidering, whether a ſecond return, made in obedience to a *mandamus* of this court, might not vacate the former; but then, I ſaw, this inconvenience would ſtill attend the court of aldermen being bound by the return, though this ſhould be ſo, *viz.* that if a return ſhould be made in the long Vacation, then ſuch a return, though a falſe one, and evidently ſo, muſt yet conclude the court of aldermen; it being then impoſſible to apply for a *mandamus*. But another abſurdity enſues from this opinion, *viz.* two concluſive returns; I ſay two; for if the laſt is not a concluſive return and the former is, this *mandamus* is vain; and if the firſt be not concluſive, why ſhould the laſt? But this opinion is confuted by the bye-law of *Henry the Fourth*, which directs them to chooſe one of the four choſen not returned. Likewiſe all the inſtances produced, of the power of the court of aldermen over returns, confute this fancy. In ſhort, the way by complaint is a compendious one; that by *mandamus*, long and intricate: for upon theſe two *mandamus's*, VIZ. that deſired, and the ſubſequent one to the court of aldermen, there may be contrary verdicts; which will leave it at laſt doubtful, whether right is done or not.

* [62]

As to the ſecond point, Whether the Court may not grant this *mandamus*, though doubtful whether it lies or not, there is no doubt but this Court have granted *mandamus's*, when doubtful: but as they may grant, ſo, moſt certainly, they may refuſe; which I think we ought to do in the preſent caſe, where the granting of it will * probably long continue that confuſion in the City, that a little good advice may ſoon put an end to (*a*).

* [63]

(*a*) The conteſts which prevailed in the City at this period, at length produced the ſtatute 11. *Geo.* 1. c. 18. by which the mode of theſe elections is now regulated.

The

The Queen *againſt* Williams.

Caſe 33.

HUSBAND AND WIFE were indicted for keeping a bawdy-houſe.

A huſband and wife may be indicted jointly for keeping a bawdy-houſe.

S. C. Salk. 384.

IT WAS MOVED *in arreſt of judgment*, that huſband and wife could not be jointly indicted for keeping a bawdy-houſe, and *Brook's Caſe (a)* was cited.

BUT *it was anſwered*, that the indictment was not only for keeping a bawdy-houſe, but for procuring lewdneſs, &c.; that theſe crimes are in their nature ſeveral; that huſband and wife may be found guilty of nuſance, battery, or the like; that the reaſon why in burglary, larceny, &c. the wife is excuſed is, becauſe ſhe cannot tell what property the huſband may claim in goods, &c.; and that in *Hilary Term*, in the ſecond year of *Queen Anne*, *James Cook* and his wife were jointly indicted for keeping a bawdy-houſe, and the huſband fined, and the wife ſet in the pillory.

THE COURT. The indictment is good. Keeping the houſe does not neceſſarily import property, but may ſignify that ſhare of government which the wife has in a family as well as the huſband.

(a) 2. Roll. 8.

* [64].

D'aeth *againſt* Baux.

Caſe 34.

THE COURT was moved for *a prohibition* to the ſpiritual court, for ſuffering a *feme covert* to ſue ſingly upon the ſtatute of Diſtributions; becauſe it was for a property ſo veſted in the huſband that it might be releaſed by him.

A *wife* may ſue in the ſpiritual court for her ſhare of an inteſtate relation's eſtate, under the ſtatute 22. & 23. *Car.* 2. c. 10. without her huſband.

2. Roll. Abr. 298.

1. Bl. Comm. 444.

2. Vern. 614.

3. Peer Wms. 39.

* THE COURT ſaid, that no prohibition lay, for this was a *choſe in action*, and ſo much the wife's that ſhe ſhall have it by ſurvivorſhip; and if the huſband had been joined in the ſuit, it would have been only for conformity. This caſe differs not from the caſe of a legacy; for which it is the courſe of the ſpiritual court to admit *feme coverts* to ſue alone; but, ſuppoſing it was not the practice of the ſpiritual court to ſuffer a *feme covert* to ſue without her huſband, the party's remedy is by appeal, not prohibition.

However a ſhort day being given to ſhew cauſe,

DR. PINFOLD, upon the laſt day of the Term, *argued againſt the prohibition*; becauſe it was a caſe where the ſpiritual court had confeſſedly a juriſdiction, and therefore they ought to proceed according to their own rules: that according to theſe rules, a woman, though a *feme covert*, was admitted to ſue *ſole* in every one of the following caſes, *viz.* firſt, when executrix; ſecondly, when adminiſtratrix; thirdly, when legatee; fourthly, when legatary; fifthly, when defaming; ſixthly, when defamed; that if this were not ſo, the party ſhould have appealed, not moved for a prohibition.

In

D'Arth against Baux.

IN ARGUING *for the prohibition*, the moſt material thing replied to was, that though the eccleſiaſtical courts had juriſdiction in this matter, yet deriving this juriſdiction from the temporal law, *viz.* the ſtatute of Diſtributions, they ought to conform their proceedings to the rules of common law.

THE COURT ſaid, that ſo they ought in matters of ſubſtance, but not in matter of form, as this moſt certainly is.

*[65]

Caſe 35. The Queen *againſt* Whitehorn, Mayor of Portſmouth.

In *quo warranto* againſt a mayor, if the defendant plead an election "*according to the* "*form of the* "*charter*," and iſſue be joined on a replication "*not elected in* "*manner and* "*form, &c.*" QUÆRE, Whether it be neceſſary for the defendant to ſhew that he has received *the ſacrament*, as preſcribed by the Corporation Act 13. *Car.* 2. ſt. 2. c. 1.

THIS was an information in nature of a *quo warranto* againſt *Whitehorn*, for exerciſing the office of mayor in the town of *Portſmouth*; and againſt others for exerciſing the office of aldermen.

* *Whitehorn* pleaded the charter of *King Charles the Firſt* incorporating the town of *Portſmouth*, &c. and ſet forth a particular clauſe in the charter, whereby it is declared, "that if the mayor "ſhall die, or for juſt reaſons be removed, it ſhall be lawful for "the aldermen to chooſe another mayor for the remaining part of "the year, until the time to elect come about again;" then he ſets forth that the mayor died, and that he was choſen by the majority of the aldermen *ſecundum formam chartæ prædict.*

THE ATTORNEY GENERAL replied *non electus modo et formâ*, &c.

The aldermen pleaded their being choſen under the mayoralty of *Whitehorn.*

Iſſue was joined upon *non electi modo et formâ, ſecundum formam chartæ.*

IT WAS INSISTED, upon the trial at the aſſizes, that the defendants, to prove the iſſue, muſt firſt prove themſelves qualified, by receiving the ſacrament according to the ſtatute of *King Charles the Second (a)*; which point, inſtead of being found ſpecially, was ſaved by the Judge who tried the cauſe.

SUBSTANCE OF AN ARGUMENT *for the defendants.* IT WAS SAID, that this act of parliament could not be underſtood to make elections void, but voidable; that the act was made for regulating, not diſturbing corporations, as it would do, if it made all elections of perſons not qualified, according to it, nullities; that there were other ſtatutes with words altogether as ſtrong as thoſe uſed by this act, which have yet received ſuch an interpretation; that the ſtatute 5. *Edw.* 6. c. 4. ſays, "that the offender ſhall be *ipſo facto* ex"communicated;" yet a precedent conviction has been held neceſſary. *It was ſaid, that acts done by officers *de facto*, though

*[66]

(a) The Corporation Act, 13. *Car.* 2. ſt. 2. c. 1.

not

not *de jure*, in execution of their office, are good (*a*). If therefore *Whitehorn* was a *de facto* mayor, that was enough to ſupport the election of the aldermen. Suppoſing upon a general iſſue, of "*electi vel non electi*," it would have been incumbent upon the defendants to prove themſelves qualified, by taking the ſacrament; yet upon this ſpecial iſſue of "*electi vel non electi ſecundum* "*formam chartæ*," this could not be neceſſary, the charter being altogether ſilent as to theſe qualifications. When iſſue is joined upon a plea, no advantage ſhall be taken of any matter collateral (*b*). In *Hobart*, 72. upon an iſſue "*feoffavit vel non*," the jury found a feoffment, but a covinous one; and the Court was there of opinion, that upon this iſſue a covinous feoffment was a feoffment; and that if the party would have taken advantage of the covin, he ought to have done it by ſpecial pleading. It is there likewiſe ſaid, that a *non eſt factum* cannot be pleaded upon the ſtatute of Uſury, or ſheriff's bonds; nor can a letter of attorney by an infant be avoided without ſpecial pleading. The reaſon of all theſe caſes ſeems to be this, that theſe things have the appearances of feoffments, bonds, &c. though they want the validity. As it would have been no evidence, upon this iſſue, to have ſhewn a title by a ſubſequent charter, it is not reaſonable the other ſide ſhould take advantage of a ſubſequent act of parliament (*c*).

(*a*) Cro. Eliz. 659. Harris *v.* Jay, Cro. Jac. 552.

(*b*) 2. And. 82.

(*c*) By 13. *Car.* 2. ſt. 2. c. 1. "no "perſon ſhall be placed, elected, or choſen "mayor, &c. who ſhall not have, within "one year next before ſuch election or "choice, taken the ſacrament, and in "default thereof every ſuch placing, "election, and choice, is declared to be "void."—But by 5. *Geo.* 1. c. 6. "no "perſon ſhall be removed by the corporation, or otherwiſe proſecuted, for or "by reaſon of ſuch omiſſion; and no "incapacity, diſability, forfeiture, or "penalty ſhall be incurred by reaſon of "the ſame, unleſs ſuch perſon be ſo removed, or ſuch proſecution be commenced within ſix months after ſuch "perſons being placed or elected into his "reſpective office, &c." And ſee Harriſon *v.* Evans, Kyd on Corp. 351. Rex *v.* Monday, Cowper, 535. Rex *v.* Smith, 3. Term Rep. 573.

Earle *againſt* Peale.

Caſe 36.

THIS was an action brought upon *a note*, for money lent to *an infant* for his ſupport and maintenance. * A verdict and judgment were given for the plaintiff; and a writ of error brought in the court of king's bench.

A promiſſory note given by an infant is void, although it is expreſſed that the money lent was for his ſupport and maintenance.

It was argued that this action did not lie.—In *Co. Lit.* 172. it is indeed ſaid, that an infant may bind himſelf to pay for his neceſſary meat and drink; but this was never carried farther. In the caſe of *Whittingham v. Hill* (*a*), it is held, that the contract of an infant for wares for the neceſſary carrying on his trade, whereby he ſubſiſts, ſhall not bind him.

S. C. 1. Salk. 386. Cro. Jac. 602. Latch. 169. Moor, 679. Palm. 528.

(*a*) Cro. Jac. 494. 560.

It

EARLE *againſt* PEALE.

IT WAS AGREED *by the other ſide*, that in caſe the money thus lent upon this note was not actually laid out by the infant for neceſſaries, the plaintiff could not recover upon it; but, it was ſaid, the plaintiff could never have obtained this verdict, without firſt proving that the money was actually ſo laid out.

THE COURT. There is a great difference between lending an infant money to buy neceſſaries, and actually ſeeing the money ſo laid out. In this caſe the lending for ſuch a purpoſe is only put in iſſue, which might be maintained without ſhewing how the money was actually laid out; that if the fact was ſo, the plaintiff ſhould have declared as for money ſo laid out, and not ſo lent. The law knows of no contracts but what are good or bad at the time of the contract made; and not to be one or other, according to a ſubſequent contingency.

Accordingly, the next Term, the judgment was reverſed, *niſi* (*a*).

(*a*) See Williams *v.* Harriſon, Carth. 160. Trueman *v.* Hurſt, 1. Term Rep. 41.

Caſe 37.

Dummer *againſt* ———.

An *elegit* ſtating the judgment to have been given on the day the writ was *ſigned*, cannot be amended.

THE COURT was moved to amend *an elegit*. The *elegit* ſet forth, that judgment was given upon the ninth day of *January*, when in fact it was given upon the twenty-third day of *October*, and ſigned the ninth of *January*.

* [68]

* In behalf of the motion were cited the caſes of *Wheadon v. Sugg* (*a*), and *Lewſon v. Redleſton* (*b*), where writs of inquiry, which are judicial writs, are held amendable; and *Vavaſor's Caſe* (*c*), and the caſe of *Herſy v. Whitlock* (*d*), about the ſame time in the common pleas, and *Brook* (*e*), where an *elegit* was held amendable.

THE COURT was of opinion that the writ was not amendable, becauſe it might occaſion an alteration in a verdict upon a *writ of inquiry*; for between the twenty-third of *October* and the ninth of *January*, he might have lands that he had not the ninth of *January*.

Adjournatur.

(*a*) Cro. Jac. 372.
(*b*) Cro. Eliz. 677.
(*c*) Hilary Term, 6. *Anne*.
(*d*)
(*e*) Bro. Abr. "Elegit" 44. *Edw.* 3.

Caſe 38.

The Queen *againſt* Wooton.

Juſtices of peace have only juriſdiction over ſervants employed in huſbandry.

Salk. 442, 442.

JUSTICES OF PEACE have no juriſdiction by the ſtatute 5. *Eliz.* c. 4. ſ. 15. to judge of wages except in caſe of *huſbandmen*: But yet the Court, in favour of *ſervants*, will always, unleſs the contrary appear upon the face of the order, preſume ſervants to be

ſervants

ſervants in huſbandry (*a*), and will admit of no collateral proof to the contrary (*b*).

(*a*) See Rex v. Gregory, 2. Salk. 484. Rex v. Helling, Stra 8. Rex v. Clegg, Stra. 475. and Reg. v. Cecil, Ld. Ray. 2305.

(*b*) By 1. *Jac.* 1. c. 6. it is enacted, "that the 5. *Eliz.* c. 4. ſhall extend to "the rating of wages of all labourers, "weavers, ſpinſters, and workmen or "workwomen *whatſoever*, either work-"ing by the day, week, month, year, "or taking any work by the great or "otherwiſe;" and by 20. *Geo.* 2. c. 19. 31. *Geo.* 2. c. 11. and 6. *Geo.* 3. c. 25. "juſtices have juriſdiction between maſ-"ters or miſtreſſes and ſervants in huſ-"bandry, hired for a year or for leſs "time; or between maſters and miſ-"treſſes and artificers, handicraftmen, "miners, colliers, keelmen, pitmen, "glaſſmen, potters, and other *labourers*, "employed for any certain or in any other "manner." But it ſeems that theſe ſtatutes do not extend to *ſervants in general*, Cald. Caſes, 57. and the caſes there cited.

Dr. Harriſon *againſt* The Archbiſhop of Dublin. Caſe 39.

THIS was A WRIT OF ERROR out of *Ireland*, and the queſtion was, Whether or no the appropriation of a rectory to a priory, or a dean and chapter, exempted this rectory from the viſitation of the biſhop, in whoſe dioceſe it lay; and if it did not, Whether he might not upon viſitation proceed to the ſuſpenſion of the incumbent *ab officio et beneficio?* Deprive him, it was clear he could not.

A biſhop, notwithſtanding appropriation, may viſit and ſuſpend, but not deprive.

S. C. 1. Brown P. C. 418. S. C. 3. Viner Ab. 40. S. C. 17. Viner Ab. 244.

THE COURT ſeemed of opinion, that the biſhop, notwithſtanding the appropriation of the benefice, might * viſit to ſee how the church was ſerved, the ſacraments adminiſtered, &c. and might proceed to ſuſpenſion.

* [69]

Adjournatur (*a*).

(*a*) See the whole proceedings in this caſe, 1. Brown's P. C. 418 to 426.

Stafford *againſt* Beneath. Caſe 40.

AN ACTION OF DEBT for fifteen pounds: the plaintiff declares upon two demiſes, and that upon the one demiſe there was ten pounds rent behind, and upon the other twelve pounds. To this the defendant demurs. Afterwards the plaintiff enters a *remittitur*, for all that appears due from the declaration, over and above the fifteen pounds demanded in the writ.

In actions upon ſpecialties or contracts, where the ſum is certain, the plaintiff cannot abridge his own demand without ſhewing how the reſt is ſatisfied; but in actions that lie in damages it is otherwiſe.

IT WAS ARGUED *for the defendant*, that ſuppoſing the declaration naught, the *remittitur* would not help it. In the caſe of *Duppa v. Mayo* (*a*) it is expreſsly reſolved, that a *remittitur* in ſuch a caſe would ſignify nothing at all; and the reaſon given for it is, becauſe a man that had a good cauſe of demurrer, at the time of his demurring, might by this means be tricked out of it. To prove the declaration bad, this ground was laid down, that in an

(*a*) 1. Saund. 285.

STAFFORD *againſt* BENEATH.

action of debt for rent, the plaintiff cannot abridge his own demand, without ſhewing how the reſt was ſatisfied. In the caſe of *Pemberton v. Shelton* (*a*), this difference is taken, that where an action is grounded upon a ſpecialty, or upon a contract where the ſum is certain, or upon a ſtatute which gives a certain ſum for the penalty, no demand can be of a leſſer ſum, without ſhewing how the reſt was ſatisfied: but where a perſon, if he recover, is to recover not a ſum certain, but according to what a jury will give; not according to his demand in the declaration, but according to the verdict; there it is otherwiſe. In the caſe of *Thornton v. Kemp* (*b*), the abating of ten pounds, not ſhewing how, is adjudged naught. In the caſe of *Hulm v. Sanders* (*c*), in an action
* [70] of debt for rent, the demand was * for a hundred pounds, and by the declaration it appeared that a hundred and eleven pounds was due; the Court were of opinion, though after a verdict, that the judgment ought to be reverſed. In the caſe of *Bolton v. Lee* (*d*), HALE, *Chief Juſtice*, took the difference between covenant and debt before-mentioned in the caſe of *Pemberton v. Shelton*, and held, that even in covenant, upon ſpecial demurrer, ſuch demand was naught.

THE COURT was of opinion for the defendant; and thought the difference taken between actions brought for a ſum certain, and actions that lay in damages, to be good law. They ſaid, that upon this declaration, they could give judgment for no leſs than twenty-two pounds, which is more than was demanded in the writ. As for the *remittitur*, if that could have altered the judgment, the Court might have done it without.

EYRE, *Juſtice*, deſired the Counſel, before they ſpoke to it again, to conſider of two caſes, that he took to be caſes in point for the defendant, *viz.* the caſe of *Young v. Watſon* (*e*), and the caſe of *Staughton v. Newcombe* (*f*).

Adjournatur.

(*a*) Cro. Jac. 499.
(*b*) 1. Cro. 447.
(*c*) 2. Lev. 4.
(*d*) 2. Lev. 57.
(*e*) Cro. Eliz. 308.
(*f*) Cro. Eliz. 434.

Caſe 41.

The Queen *againſt* Morgan.

Serving an apprenticeſhip partly *in* and partly *out* of *England* is ſufficient.

1. Salk. 67.

RESOLVED *obiter* by THE COURT, upon the ſtatute 5. *Eliz.* c. 4. ſ. 31.

FIRST, That ſerving five years to a trade out of *England*, and two in *England*, is enough, and ſatisfies the ſtatute. But there muſt be a ſervice of a full time either in *England* or out of *England*; therefore ſerving five years in a country where by the law of the country more is not required, will not qualify a man to uſe the trade in *England*.

SECONDLY,

SECONDLY, That a wife living with her husband seven years, may, after his death, continue the trade; for the statute 5. *Eliz.* c. 4. does not require a man or woman to be an actual apprentice, but the words are *tanquam* an apprentice.

Serving as an apprentice is sufficient.

2. Salk. 613. Carth. 163. 2. Hawk. P. C. 462.

* THIRDLY, That if a man live with another who uses a trade, which other is not qualified for using it, seven years, he may set up the trade as well as if he had lived with one never so well qualified.

* [71]

A person serving seven years with an unqualified master is sufficient.

Anonymous. Case 42.

ON A MOTION to quash a writ *de excommunicato capiendo*,

A writ of *excom.* need not state the cause of defamation.

THE FIRST EXCEPTION was, that the writ says only "*causâ* "*defamationis*," but does not say what defamation; now there are some defamations that are not of spiritual conuzance.

2. Atk. 498. 1. Salk. 293. B. R. H. 314. Stra. 43. 950.

This objection was over-ruled by the Court, who said, they would not presume that any court would exceed its own jurisdiction, unless it appeared plainly it had done so.

THE SECOND EXCEPTION was, that the standing forty days excommunicated, did not appear in the writ.

A writ of *excom.* need not state the *forty days* excommunication.

Sed non allocatur, for the forty days are never inserted in *the writ*, but in the *significavit* only (*a*); besides, this objection is not proper here, but in chancery; the forty days excommunication being the very foundation upon which the Court grants the writ.

F. N. B. 64. 12. Co. 76.

THE THIRD EXCEPTION: There must be a proper addition; now the word was "*chiothecario*," instead of "*chirothecario*."

Addition.

Sed non allocatur.

(*a*) See Cro. Car. 197. 199. 2. Jones, 89. 3. Mod. 89. 1. Salk. 294. 4. Com. Dig. "Excommengement" (B. 4.)

Thomlinson *against* Dighton. Case 43.

PARKER, *Chief Justice*, delivered the resolution of the Court to the following effect:—There are two questions in this case —The first is, Whether the wife by this devise took an estate in fee, or for life?—And secondly, Whether her power was well executed?

If a testator devise lands to his wife for life, and then to be at her disposal, provided it be to any of his children, the wife takes only an estate for life; and a conveyance, by lease and release and fine to a trustee to the use of herself for life, without impeachment of waste, with remainder to her daughter by the testator in tail, with remainder to her son by the testator in fee, is a good execution of the power.—S. C. ante, 31. S. C. 1. Salk. 239. S. C. 2. Eq. Abr. 309. S. C. 1. Peer Wms. 249.

THOMLINSON *against* DIGHTON.

* As to THE FIRST QUESTION, We are all of opinion, that ſhe took but an eſtate for her life. Becauſe the will expreſsly gives her an eſtate for life; and the power of diſpoſal does not at all alter her eſtate, becauſe it is a diſtinct clauſe. The caſes relied upon by the Court for their opinion in this point, were an *Anonymous Caſe* in *Leonard* (*a*), upon which great ſtreſs was laid; the caſe of *Daniel v. Uply* (*b*); and the caſe of *Sir Richard Saltonſtall* (*c*), devise to a wife for life, with a power to diſpoſe of it to which of her children ſhe pleaſed.

As to THE SECOND QUESTION, We are all of opinion, that the power is well executed. For as to the firſt objection, that the power was extinguiſhed by the fine, it may be anſwered, that if the power was well executed, it was executed by the deed, which was antecedent to the fine; and therefore it is impoſſible for the power to be extinguiſhed by the fine.

As to the ſecond objection, that the power ought to have been executed by *will*, and not by *deed*; which is built upon the word "then," importing, as they ſay, that very inſtant of time when her eſtate determines; then, and not till then, her power enables her to diſpoſe, and which muſt neceſſarily be done by will. To this objection we anſwer, FIRST, That the words of the power do not expreſsly mention any particular way of conveyance, by which this power ſhould be executed, but leave it indifferent. *Hobart* ſays (*d*), "that all forms and circumſtances of powers are to be obſerved;" but then it is added, that "this is to be underſtood of ſuch forms "and circumſtances as are expreſſed, not imagined:" now here no particular ſort of conveyance is expreſſed. That caſe laſt mentioned in *Hobart*, was indeed the reverſe of this; for there the
* [73] queſtion was concerning the power of revocation, but here * of the execution. However it fits the preſent caſe; for there the queſtion was, Whether a revocation could be executed by will? for from the words of the proviſo, "then and thenceforth," it was argued, that no revocation could be good, that was done by will; for a will, as was ſaid, is revocable, and is of no force at all until the death of the teſtator; whereas, it was urged, that THE PROVISO ſays, "then, and from thenceforth," *viz.* from the time of ſealing, &c. the uſes ſhall be executed, which a will cannot do. But the Court held the power of revocation might be executed by will, and that the words "then and thenceforth" ſhould be rejected as ſurpluſage.—SECONDLY, The word "then" refers to the remaining of the lands, and not to the time of the diſpoſing them, *viz.* that then her diſpoſal, when ſo made, ſhall take effect.—THIRDLY, "Then" is equivalent to "after her death," which ſhews it cannot be done by will.

(*a*) 3. Leon. 71. See alſo Higham *v.* Baker, Cro. Eliz. 15.
(*b*) 1. Jones, 137. Latch, 9. 39. 154. Noy, 80.
(*c*) 2. Lev. 104.
(*d*) Hob. 312.

As

AS to THE THIRD OBJECTION, that it was executed by a conveyance to the parties, and not truſtees, we anſwer, That theſe powers are executed by all ſorts of conveyances. 1. *Rolls*, 329. *Dike v. Rich.* 1. *Ventris*, 228. *King v. Melling.*

AS to THE FOURTH OBJECTION, that this conveyance left in her an eſtate for life, without impeachment of waſte, which was not in her power to do; we anſwer, The children will be in, not by virtue of her conveyance, but by the will, and ſo will overreach her eſtate without impeachment of waſte; and conſequently that clauſe in the conveyance, "without impeachment of waſte," will have no operation; for the children may notwithſtanding bring an action of waſte againſt her.

HILARY TERM,

The Tenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir Thomas Powys, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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* The Queen *againſt* Sutton.

Caſe 44.

THIS was an information in nature of a *quo warranto* againſt *Sutton*, for uſurping the office of a common burgeſs of the town of the *Devizes*, in *Wiltſhire*.

The office of *deputy-recorder* is grantable by parol, and therefore the *copy* of a writtenappointment is not evidence, unleſs it be ſhewn that *an original* exiſted, and is loſt.

Upon a trial at bar upon this iſſue, whether *Sutton* was choſen a capital burgeſs, by the mayor, recorder, and capital burgeſſes, the following points aroſe:

THE FIRST QUESTION. The recorder had made a deputy-recorder, by writing under his hand and ſeal, and afterwards had revoked this deputation by another writing, a copy of which was offered in evidence of the revocation.

But this was held not good evidence, becauſe it did not appear but they might have produced the original. The deputation of an office is in its own nature grantable by parol; and therefore though it ſhould happen to be granted by writing, yet ſince it is in itſelf grantable by parol, it may be revoked by parol.

If a charter impower "the "mayor, recorder, and "burgeſſes, *vel* "*major pars eorundem* to "act;" acts done by the mayor and burgeſſes without the recorder are good.
1. Str. 53.
3. Wilſ. 398.
1. Ld. Ray. 1236.
2. Salk. 434.
Kyd on Corp. 398. 427.

THE SECOND QUESTION. By the charter that incorporates this town, the mayor, recorder, and, in his abſence, deputy-recorder, and capital burgeſſes, *vel major pars eorundem*, are impowered * to chooſe capital burgeſſes.

The queſtion was, Whether, upon theſe words of the charter, "acts done by the mayor and majority of the burgeſſes, without "the preſence of the recorder, or his deputy," were good?

THE COURT ſeemed to incline that they were good, becauſe the word "*eorundem*" refers not only to "capital burgeſſes," but to "mayor, recorder, and capital burgeſſes;" and yet the reaſon why the preſence of the mayor is neceſſary to corporate acts, is not becauſe he is particularly named, but becauſe he is the head of the corporation; and if this were not ſo, the addition of theſe words in charters, *quorum* recorder *unus*, would be uſeleſs and unneceſſary (*a*).

What evidence ſhall be neceſſary of the authority of a corporation to do corporate acts.

THE THIRD QUESTION was, Whether, ſuppoſing it not neceſſary by the charter that the recorder ſhould be preſent, yet the iſſue did not oblige them to prove him preſent at the election?

To this it was ſaid by the Counſel, that *conceſſo* the charter did not require the preſence of the recorder, the queſtion was no more than this, Whether they ſhould be obliged to prove an immaterial part of the iſſue? It was ſaid farther, that by a parity of reaſon it might be expected, that they ſhould prove the preſence of every one of the common burgeſſes; that by the iſſue no more was meant than that the election was made by thoſe that had a power to do it; that *ubi major pars, ibi tota*, VIZ. the authority of the whole.

And of this opinion was THE COURT.

Quære, Whether a perſon may be both *mayor* and *deputy-recorder*.

THE FOURTH QUESTION ſtarted was, Whether, in a corporation that was by charter to conſiſt of mayor, recorder, common burgeſſes, &c. the ſame perſon might not be both mayor and deputy-recorder (*b*)?

* [76]

If a charter appoint a burgeſs to be ſworn in before "the "mayor, recorder, and "burgeſſes, or "the majority "of them then "there preſent;" *quære*, Whether there muſt be a majority of the whole body preſent?—See Kyd on Corp. 424.

THE FIFTH QUESTION was upon the words of the charter, which appoints the ſwearing of a common burgeſs to be done before the mayor, recorder, common burgeſſes, or the majority of them, *tunc ibi præſentium*; * Whether or no a majority of the whole body was by theſe words neceſſary to be preſent at the ſwearing; or, Whether a majority of thoſe that were preſent was only requiſite, though they ſhould not be the majority of the whole?

(*a*) See 2. Bar. K. B. 74. Rex v. Newſham, Sayer, 211. Rex v. Monday, Cowp. 537. Rex v. Grimes, 5. Burr. 2598. Rex v. Varlo, Cowp. 248. Rex v. Bellringer, 4. Term Rep. 810. 1615. Rex v. Jordan, B. R. H. 285. Rex v. Goodwin, Bougl. 383. *notis*. Rex v. Pateman, 3. Term Rep. 777. Milward v. Thatcher, 2. Term Rep. 80.; and ſee Kyd on Corporations, 369.

(*b*) See Rex v. Trelawney, 3. Burr.

It

It was ſaid, that upon the reaſon of the thing it was not neceſſary that the ſwearing in ſhould be done with the ſame ſolemnity as the chooſing in; for the choice is a voluntary deliberate act; the ſwearing in, on the contrary, is what a perſon once choſen may challenge as his right, and may by *mandamus* compel them to do. And if this conſtruction did not prevail, the words in this clauſe of the charter, concerning the ſwearing, *tunc ibi præſentium*, which are not in the clauſe concerning the election, would ſignify nothing.

As for the objection, that it ſeems abſurd to ſay a man muſt be ſworn before a majority of thoſe that are preſent, ſince if they are preſent he muſt unavoidably be ſworn before them all, the anſwer is, that this clauſe is to be underſtood of being ſworn in by the conſent of a majority of thoſe that were preſent.

THE SIXTH QUESTION was, Whether, by a charter that requires acts to be done by *a majority* of the corporation, a perſon might not be removed by a majority of that body, excluding the perſons that are to be removed, and cannot vote in their own cauſe?

If a charter gives power *a majority* to remove, it means a majority of the whole corporation.

But THE WHOLE COURT were of opinion, that a removal being an act of an odious nature, all clauſes concerning it muſt receive a ſtrict interpretation; and that therefore the word "majority" ſhould be underſtood of a majority of the whole corporation?

Kyd on Corp. 309. 311. 400.

* [77]

A SEVENTH QUESTION raiſed was, Whether not ſummoning to a meeting members *de facto* diſfranchiſed, though afterwards upon re-examination it ſhould appear they were ſtill lawful members, ſhould vacate acts done * in thoſe meetings?

A ſummons to a meeting of members *de facto* is good.

Kyd on Corp. 312. 430. 452. B. R. H. 151. 2. Stra. 584.

THE COURT inclined to think it would not vacate them.

Some of theſe points were directed to be found ſpecially.

Aſſievedo *againſt* Cambridge.

Caſe 45.

UPON A SPECIAL VERDICT the caſe in ſubſtance appeared to be this:

If a ſhip inſured be taken by the enemy, and after a poſſeſſion of nine days, but before ſhe is carried *infra præſidia*, be retaken by an *Engliſh* man of war, the property is not changed; but if it be found that the plaintiff in the policy is not *concerned in point of intereſt*, he cannot recover againſt the underwriters.

Aſſievedo had inſured ſo much money upon a ſhip called THE RUTH, for ſuch a voyage, in which ſhip *Aſſievedo* is found by the verdict *not to be at all concerned, in point of intereſt*. It happened that this ſhip was taken by the enemy, and kept in their poſſeſſion for nine days, and then, before it was carried *infra præ-*

ſidia,

ASSIEVEDO against CAMBRIDGE.

ſidia, VIZ. a place of ſafety, it was retaken by an *Engliſh* man of war (*a*).

The queſtion was, Whether or no this was ſuch a taking as ſhould enable the plaintiff to recover the ſum inſured againſt *Cambridge*?

DR. FLOYER *for the plaintiff* argued, that this was rather to be eſteemed *a wager* than *an inſurance*; a *ſpei emptio et venditio*, and not a *verſio periculi*, which in the books of the civil law is looked upon as a proper definition of an inſurance; that therefore whatever acts of parliament are made about inſurances muſt be underſtood of proper inſurances, and not inſurances of the goods of ſtrangers; that whether or no this is ſuch a taking as will deveſt the property out of the owners, is a queſtion properly between them and the retakers; but that the queſtion between *Aſſievedo* and *Cambridge* is only, Whether the ſhip be taken? * This caſe was compared to a man laying a wager that he ſhould not be robbed in going to ſuch a place; he is robbed, but taking ſome along with him purſues the robber, and recovers what he loſt: here, though the money is recovered, yet the wager is loſt. So if the wager had been, that ſuch perſons ſhould not be married together; they are married, and afterwards divorced, *præcontractûs cauſâ*, yet the wager is loſt. It was ſaid further, that without this expoſition *Cambridge* would have two chances, *viz.* that it is not taken, or that it is retaken; but *Aſſievedo* would have but one, *viz.* the taking. *Grotius* (*b*) lays this down as a rule, *placuit gentibus, ut is cepiſſe rem intelligatur, qui ita detinet, ut recuperandi ſpem probabilem alter amiſerit.* Now in our caſe the ſhip was for nine days together in the poſſeſſion of the enemy. By the laws of *Spain* and *France*, a continuance in the poſſeſſion of the enemy for twenty-four hours is an alteration of the property; and *Albericus Gentilis* tells us, that a pernoctation with the enemy would, by our old *Engliſh* law, alter the property. And *Grotius*, immediately after the place before-mentioned, ſays, that "*recentiori jure gentium* "*inter* EUROPÆOS *populos introductum videmus, ut talia capta* "*cenſeantur ubi per horas viginti quatuor in poteſtate hoſtium* "*fuerint.*"

* [78]

DR. HENCHMAN *for the defendant* argued, that ſurely the law would not put an inſurer *non bona fide*, or a wagerer, in a better condition than one that inſured *bona fide*, and ſay that any taking ſhall enable a wagerer to recover; but that no taking but ſuch as

(*a*) It appears upon the ſpecial verdict in this caſe, that "the man of war which "retook the ſhip brought her into the "port of *London*, and reſtored her to the "owner upon reaſonable redemption;" and therefore it is ſaid, that the queſtion in this caſe could not have ariſen upon the *change of property*, becauſe the owner not abandoning the ſhip could only have come upon the inſurers for the redemption; but that THE POLICY being "*intereſt or* "*no intereſt without benefit of ſalvage*," the queſtion was upon the terms and meaning of the wager: *per* LORD MANSFIELD, in the caſe of Goſs *v.* Withers, 2. Burr. 695.

(*b*) Grotius de Jure Belli et Pacis, lib. 3. cap. 6. ſect. 3.

alters

alters the property ſhall enable a real *bona fide* inſurer to recover. * This queſtion in the court of admiralty would not have borne a diſpute; for the law is clear, that not length of time, but the bringing *infra præſidia*, into a place of ſafety, is that which deveſts the property. And for that the caſe of *The Eaſt-India Company v. Sands*, in the late war, was cited; where the ſhip was taken by *Dubart*, in the year 1691, off of *Yarmouth*, carried to *Northbergen*, then ſold to *A.* afterwards ſold to *B.* *B.* ſends her to the *Weſt-Indies*, afterwards to *France*, and in the year 1695 to *England*, where, ſhe being retaken, it was reſolved, that the property was not altered. The words of the judgment in this and the like caſes are very remarkable: "*in præſenti pertinere*" is part of the ſentence: ſo that the ſentence does not give a new right, but confirms an old one. In the civil law, alteration of property is a thing of an odious nature; and therefore the law, even by a fiction, prevents it, as in the *jus poſtliminium*; where, in order to preſerve property in the perſon returning *jure poſtliminii*, the law eſteems him never to have been a captive, that ſo *manente cive maneant ſua bona*.—LUD. MOLIN. *de Juſtitia, in Diſputatione* 118. "*Priori-*" *bus dominis reſtituenda quæ capta fuerint ab militibus, quibus* "*numerantur ſtipendia. Bello res per vim uſurpantur, quando ad* "*locum tutum, &c.*" PETRINUS BELLUS, *Part* 3. *No.* 11, *de Poſtliminii Jure reverſis*: "*Inſuper ſciendum, hoſtibus capta non* "*ſtatim hoſtium fieri. Milites dicunt*, that things ſo long in the "poſſeſſion of the enemy *eorum fieri: jura hoc non dicunt, cum* "*fieri poteſt* that the property may be altered by the poſſeſſion of "a ſhorter time, *et forſan* not altered *diuturniori poſſeſſione.*" CONSULAT. DEL MARE, *cap.* 287. a book of great authority, lays down the ſecurity of the place into which *deducuntur capta*, as that which cauſes the alteration of property; otherwiſe, after a proper reward to the retakers, *prioribus, &c.* * ALBERICUS GENTILIS, in the place quoted by the advocate for the plaintiff, has for his title theſe words: "*Rem non fieri hoſtis ante deduc-*" *tionem infra præſidia:*" and his determination is purſuant to his title, and expreſsly againſt what THE DOCTOR quoted. GROTIUS, *lib.* 3 *cap.* 9. *ſect.* 16. "*Eæ vero res, quæ infra præſidia perductæ* "*nondum ſunt, quanquam ab hoſtibus occupatæ, ideo poſtliminii* "*non egent, quia dominum nondum mutarunt ex gentium jure.*" As for the quotation out of GROTIUS, "*recentiori jure, &c.*" GROTIUS builds there upon a miſtaken foundation; for he quotes *Albericus Gentilis, lib.* 3.; and there is no third book. Indeed, in *cap.* 3. *lib.* 1. there is ſomething like it; but *Grotius* quoted there part of an argument, without conſidering the concluſion, which is directly againſt his quotation; "*perductionem omnino deſiderant* "*omnia*," ſays the book.

ASSIZES AT CAMBRIDGE.

* [80]

THE COURT ſeemed to be of opinion for the defendant. They thought, that the plaintiff's being found by the verdict to have *no intereſt* in the ſhip which he inſured ſhould make no difference. Firſt, Becauſe they never would be more favourable to an inſurer *non bona fide*, or wagerer, than to one that inſured *bona fide*. Secondly,

ASSURED *againſt* CAMBRIDGE.

Secondly, Becauſe to make a different interpretation of this deed from what is commonly put upon policies of inſurance, would be to run counter to the deſigns of the parties, who have made uſe of the very ſame words that are uſed in ſuch policies; nay, who have expreſsly provided for this very caſe, by theſe words, "*intereſt or* "*no intereſt*;" which words ſignify nothing at all, unleſs the ſame loſs intitles to a recovery where the inſurer has no intereſt, and where he has. AND THAT the property is not altered by the taking, they held to be very plain.

To be argued next Term by common lawyers (*a*).

(*a*) It does not appear from any report, that a ſecond argument was ever heard in this caſe, Park Inſ. 73.—But ſee now the ſtatute 13. *Geo.* 2. c. 4. Park on Inſurances, ch. 4. and the ſtatute 19. *Geo.* 2. c. 37. Park on Inſ. ch. 14. and Wooddeſon's Lectures, vol. ii. Lect. 34.

*[81]

Caſe 46.

* The Queen *againſt* Doughton.

A pauper cannot be removed to an extra-parochial place.

THE CASE was this: A man ſettled in *a pariſh* removed into an *extra-parochial place*, where he gained a ſettlement, then removed into another pariſh, and there became chargeable.

The queſtion was, What this laſt pariſh can do with him? Whether, by virtue of that act of parliament that enables them to ſend ſuch a one to the laſt pariſh where he was legally ſettled, they may ſend him to the pariſh he lived in before ſuch time as he removed to the extraparochial place? for ſend him to the extra-parochial place they cannot, for want of officers to receive him.

POWELL, *Juſtice*, took this to be *caſus omiſſus*, and what ought to be moved in parliament; theſe extraparochial places being many in number, and of great extent (*a*).

(*a*) A pauper cannot be removed to an extra-parochial place, Rex *v.* Tamworth, Cald. 28. Bridewell *v.* Clerkenwell, Salk. 486; nor to a place which does not ſeparately maintain its own poor, Rex *v.* Swaccliffe, 2. Conſt's P. L. 760.; but if the place be *a vill*, overſeers may be appointed, 1. Conſt's P. L. 23.; and then the pauper may be removed, 1. Conſt's P. L. 28.

Caſe 47.

Whitlock *againſt* Squire.

Tout temps pres muſt be from the time the *cauſe of action* aroſe, and not from the time of *tender*.

THIS was an *indebitatus aſſumpſit* for goods ſold and delivered.

The defendant pleaded in bar, that before the time of bringing the action he made *a tender* of the money, and that ever ſince the tender *paratus fuit* to pay the money.

Salk. 623.
3. Salk. 343.

It was inſiſted upon, that the plea in bar was not complete enough; for he ought to have pleaded, that he has been ready to pay the money, not only ever ſince his tender, but from the time the goods were delivered, *viz.* from the time the money firſt became due.

And

And THE COURT ſeemed to think this a material omiſſion; for it may be the money was demanded before the tender, and then there is a good cauſe of action.

WHITLOCK *againſt* SQUIRE.

*[82]

* Silk *againſt* Hill.

Caſe 48.

THE QUESTION was, Whether, in *a writ of enquiry*, it was not neceſſary that there ſhould be fifteen days between the *teſte* and the return, as well as in other writs?

Whether in a writ of enquiry, as in other writs, there ſhould be fifteen days between *the teſte* and *the return*.

THE COURT ſeemed not to think it neceſſary, even by common law; but if it were neceſſary by common law, that it was helped by the equity and intention of 13. *Car.* 2. c. 2. ſ. 6. They did not think it neceſſary by the common law; becauſe the ſtatute of *Articuli ſuper Chartas*, 28. *Edw.* 1. c. 15. made in affirmance of the common law, requires fifteen days between the *teſte* and the return of all *ſummons* and *attachments* (*a*), as a reaſonable time, in which the party, in whatſoever part of *England* he is, may be brought to court; but now *a writ of enquiry* is no ſummons, nor in nature of a ſummons; for both defendant and jurors are out of court. But ſuppoſing that by the common law fifteen days are required, yet they thought it might be within the equity and intention of the ſtatute of 13. *Car.* 2. c. 2. the words whereof are, "that in all actions of debt, and all other perſonal actions, and "actions of ejectment, after an iſſue joined therein to be tried by "a jury, and after any judgment had in any ſuch action, there "ſhall not need to be fifteen days between the *teſte* and the return "of the writs of *venire facias*, *habeas corpora juratorum*, *diſtringas* "*juratores*, *fieri facias*, *capias ad ſatisfaciendum*; and that the "want of fifteen days between, &c. in any ſuch writ, ſhall not be "a cauſe of error." * Now the words "any judgment" ſuppoſe more than one ſort of judgment; but after a verdict, there are but two ſorts, *viz.* final and interlocutory judgments. Now after an interlocutory judgment, there never goes any writ but a writ of inquiry; therefore ſhould not this ſtatute extend to a writ of enquiry, the word "any" would be improperly uſed. And then the concluſion of the ſtatute, "nor ſhall the want, &c. in any ſuch "writ, &c." are words ſo general, that they need not be tied up to the writs before mentioned in the ſtatute, but may very well be underſtood of writs of the ſame nature, and following ſuch judgments: if indeed the concluſion had been, "in any of the writs "before recited," the ſtatute could not have borne ſuch an interpretation.

*[83]

But the court of common pleas differing in their practice, in this particular, from the court of king's bench, according to the reports of THE CLERKS, it was judged proper for the judges of both courts to meet and eſtabliſh one uniform rule of practice.

(*a*) Co. Lit. 134. 2. Inſt. 567.

EASTER

EASTER TERM,

The Eleventh of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir Thomas Powys, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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* Anonymous.

Caſe 49.

An order of removal not appealed againſt is concluſive.

IF A POOR PERSON be removed from the pariſh of *A.* to the pariſh of *B.* by an order of two juſtices, and the pariſh of *B.* remove him to the pariſh of *C.* the order of the juſtices removing him to the pariſh of *B.* is become final, becauſe *B.* did not appeal to the quarter-ſeſſions (*a*).

(*a*) See Rex *v.* Chipping Farringdon, Salk. 48. Malendine *v.* Hunſdon, Foley, 316. Rex *v.* Silcheſter, Burr. S. C. 551. Rex *v.* Llanhydd, Burr. S. C. 458. Rex *v.* Kirby Stephen, Burr. S. C. 664. Rex *v.* Hinxworth, Cald. 42. Rex *v.* Swacliffe, Cald. 248. Rex *v.* Southouram, 1. Term Rep. 353. Rex *v.* Kenilworth, 2. Term Rep. 598.

Anonymous.

Caſe 50.

An order for the maintenance of a baſtard-child is good, though it do not ſtate that it was likely to be chargeable.

1. Conſt's P. L. 432.

AN EXCEPTION was taken to an order of juſtices made for the maintenance of a baſtard-child, that it was not ſet forth in the order, that the baſtard-child was likely to become chargeable to the pariſh, which is the very foundation of the juriſdiction of the juſtices of peace.

Sed non allocatur; for the law preſumes that baſtard-children will become chargeable, becauſe nobody is bound to provide for them; and therefore this need not appear on the order.

ANOTHER,

An order of maintenance to pay so much a week until the child shall be eight years old, is good.
1. Vent. 48. Salk. 478. 1. Const's P. L. 433.

* ANOTHER OBJECTION was, that the order was for the reputed father to pay so much a week for the maintenance of the child, until the child should come to the age of eight years; whereas the order ought to have been conditional, if the child continue so long chargeable.

Sed non allocatur; for such orders in the very same form have often been allowed; and the words of the order, "towards maintenance of the child," imply such a condition.

Justices have original jurisdiction in bastardy.
Cro. Car. 471. Bulst. 255. 2. Bulst. 355. Salk. 122. 1. Stra. 475.

N. B. In case of bastards, complaint is not necessary to the giving justices of the peace jurisdiction, as it is in the case of poor (*a*).

(*a*) See Rex v. Greaves, Dougl. 632. and Mr. Const's edition of Bott's Poor Laws, 442 to 447.

Case 51. Mitchell *against* Reynolds.

A bond conditioned for restraining a man from the exercise of his trade for *a certain time*, and in *a certain place*, when entered into upon fair and reasonable consideration, is good.
S. C. ante, 27. S. C. post. 130.

THAT the bond was void these cases cited: 2. *Hen.* 5. 3. *Levinz*, 24. 3. *Cro.* 208. where if a sheriff take *a bond* for his execution fees it shall be void; but held that *a promise* would have been good.

ON THE OTHER SIDE *it was said*, that an infant could not, either by a parol contract or a deed, bind himself, even for necessaries, in a sum certain; for should an infant promise to give an unreasonable price for necessaries, that would not bind him; and therefore it may be said, that the contract of an infant for necessaries, *quatenus* a contract, does not bind him any more than his bond would; but only since an infant must live, as well as a man, the law gives a reasonable price to those who furnish him with necessaries. The case in the Year-Book of *Henry the Fifth* was but the extrajudicial opinion of a single Judge; and then it was a total restraint for a particular * time, whereas this is but a restraint in a particular place. And for the case of execution fees, upon the statute of 29. *Eliz.* c. 4. it was to prevent oppression; for the sheriff might threaten the persons concerned, that he would not let them have the execution unless they would enter into such a bond.

* [86]
S. C. Fort. 296. S. C. 1. Peer. Wms. 181. Cro. Jac. 739. Cro. Eliz. 872. Powell on Contracts, 169. 5. Term Rep. 218.

THE JUDGES retained the same opinion they had in a former argument upon this case.

EYRE, *Justice*, said, that if the bond was void, the reason must be, because it was *malum in se*; and then several customs which stand upon the same reason, and have been adjudged good, will be overthrown; and he was of opinion, that the jury had no more power in an *assumpsit*, where the promise was certain, to mitigate the damages, than they had in case of a bond; and if so, the reason of the difference between bond and *assumpsit*, that has been so much insisted on, falls to the ground (*a*).

(*a*) See same case, ante 27. and post. 130. where the Court delivered a unanimous opinion that the bond was good.

Widdrington

Widdrington *againſt* Charleton. Caſe 52.

THIS was an appeal brought by the wife for the murder of her huſband. Appeal for murder.

To which there was a demurrer.

REEVES *for the appellee* inſiſted, that as in the writ the "*t*" in the word "*appellat*" was turned up, the writ was inſenſible, and in the eye of the law no writ at all.

CHESHIRE *for the appellant* anſwered, that the turning up of the "*t*," being no known abbreviation, ſhould go for nothing. 3. *Cro.* 182. 467. *Mich.* 1693. *Ball v. Roe.*

REEVES *for the appellee* then inſiſted, that there was *a diſcontinuance*; for in *the exigent* the words "*de morte ſui viri, unde eum* "*appellat*," were omitted; and therefore it did not appear that this *exigent* was ſued out in this action. What ſhall be conſidered as a diſcontinuance.

* [87]

* CHESHIRE *for the appellant* ſaid, that this was an *exigent* ſued out between the ſame parties that the *capias* was; and that there is no variance between *the capias* and *the exigent*, though there is ſomething more contained in *the capias* than what is in *the exigent*. And upon prayer of *oyer* of meſne proceſs in this action, this *exigent* was recited, and thereby admitted to be *the exigent* in this ſuit. He argued further, that this *diſcontinuance*, if it was one, was aided by appearance; and that the difference taken, that appearance and pleading-over aids *a diſcontinuance*, but not appearance and demurrer, was not law. 9. *Hen.* 5. *fol.* 2. 2. *Cro.* 284. *Roll. Abr.* 789. 4. *Co. Rep. Boſſe's Caſe.* 1. *Ventris*, 7. B. R. H. 39. 2. Bar. K. B. 348. 3. Atk. 570. 1. Stra. 155. 2. Stra. 989.

Adjournatur.

Rogers *againſt* Wood. Caſe 53.

A RELEASE OF A RECOGNIZANCE was pleaded to be, "*ante* "*emanationem ſcire facias.*" Plea of a releaſe of a recognizance bad.

This is naught; for it might be made before the action was brought, and the plea true, and then the releaſe is void. 5. Co. 70. 1. Inſt. 265. Goldſb. 166. Moore, 469.

MICHAELMAS TERM,

The Eleventh of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir Thomas Powys, *Knt.*
} *Juſtices.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Robert Raymond, *Knt. Solicitor General.*

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* Ruſh *againſt* Seymour. Caſe 54.

THE STATUTES OF AMENDMENT extend only to pleadings of *record*; therefore pleadings, while *in paper*, are amendable by common law (*a*). Anciently, all pleas were *ore tenus* at THE BAR; and then if any error was ſpied in them, it was preſently amended. Since that cuſtom is changed, the motion to amend, becauſe all in paper, ſucceeded in the room; and it is a motion that the Court cannot refuſe: but they may refuſe it, if the party deſiring it refuſe to pay coſts, or the amendment deſired ſhould amend to a new plea.

Amendments may be made by the common law while the proceedings are in paper.

1. Com. Dig. "Amendment" (A.).

(*a*) See Bondfield v. Milner, 2. Burr. 1098.

MICHAELMAS TERM,

The Eleventh of Queen Anne,

IN

The Court of Chancery.

BEFORE

Sir Simon Harcourt, *Knt. Lord Keeper.*
Sir Thomas Parker, *Knt. Chief Juſtice.*
Sir Thomas Trevor, *Knt. Chief Juſtice.*
Sir John Powell, *Knt. Juſtice.*
Sir John Trevor, *Knt. Maſter of the Rolls.*

* Radcliffe *againſt* Roper. Caſe 55.

THIS being a caſe of conſequence, SIR SIMON HARCOURT, *Lord Keeper*, was aſſiſted by SIR THOMAS PARKER, *Lord Chief Juſtice* of the Court of King's Bench, SIR THOMAS TREVOR, *Lord Chief Juſtice* of Common Pleas, POWELL, *Judge* of the Court of Queen's Bench, and SIR JOHN TREVOR, *Maſter of the Rolls.*

In this caſe three points reſolved: 1ſt, If an eſtate be deviſed to be ſold for payment of debts, ſurplus to a Roman Catholic; that this ſurplus is in nature of a real intereſt, and as ſuch void, by act of *King William*. Reſolved, 2dly, That the word "purchaſe" in that act does include deviſe. Reſolved, 3dly, That a ſubſequent deviſe to *A* though *A.* be incapable of taking, is a revocation of a precedent deviſe to *B.* S. C. poſt. 230.—S. C. 9. Mod. 167. 181. S. C. 2. Eq. Ab. 598. 592. 620. 772. S. C. 1. Bro. P. C. 450.

The caſe in ſubſtance was thus:

A *Roman Catholic* deviſed his land to four truſtees, two *papiſts* and two *proteſtants*, to be ſold for the payment of debts and legacies; and by a codicil, amongſt other legacies, he deviſed the remainder, whether in lands or perſonal eſtate, to two papiſts and their heirs.

The queſtion was, Whether this was a good deviſe, ſo as to diſinherit the heir at law, being a proteſtant, notwithſtanding the 11. & 12. *Will.* 3. c. 4. made for preventing the growth of popery.

For the better underſtanding the force of the argument on each ſide the queſtion, it will be proper to premiſe the aforeſaid act.

RADCLIFFE *againſt* ROPER.

By the ſaid act it is provided, "That from and after the twenty-
" ninth day of *September* 1700, if any perſon educated in the popiſh
" religion, or profeſſing the ſame, ſhall not, within ſix months after
" he or ſhe ſhall attain the age of eighteen, take the oaths of, &c.
" and ſubſcribe, &c. every ſuch perſon ſhall, in reſpect of him or
" herſelf only, and not to or in reſpect of any of his or her heirs or
" poſterity, be diſabled and made incapable to inherit or take by
* [90] " deſcent, deviſe, or limitation, in * poſſeſſion, reverſion, or
" remainder, any lands, tenements, or hereditaments; and that
" during the life of ſuch perſon, or until he or ſhe do take the ſaid
" oaths, and ſubſcribe, &c. the next of his or her kindred, which
" ſhall be a proteſtant, ſhall have and enjoy the ſaid lands, tene-
" ments, and hereditaments, without being accountable for the
" profits by him or her received during ſuch enjoyment thereof
" as aforeſaid; but in caſe of any wilful waſte committed on, &c.
" by the perſon ſo having or enjoying the ſame, &c. the party
" diſabled, his or her executors and adminiſtrators, ſhall recover
" treble damages for the ſame, &c. And that from and after the
" tenth day of *April* 1700, every papiſt, or perſon making pro-
" feſſion of the popiſh religion, ſhall be diſabled, and is hereby
" made incapable, to purchaſe, either in his or her own name, or
" in the name of any other perſon or perſons, to his or her uſe, or
" in truſt for him or her, any manors, lands, profits out of lands,
" tenements, rents, terms or hereditaments; and that all and
" ſingular eſtates, terms, and any other intereſts or profits what-
" ſoever out of lands, from and after the ſaid tenth of *April*, to
" be made, ſuffered, or done, to or for the uſe or behoof of any
" ſuch perſon or perſons, or upon any truſt or confidence, mediately
" or immediately, to or for the benefit or relief of any ſuch perſon
" or perſons, ſhall be utterly void and of none effect, to all intents,
" conſtructions, and purpoſes, whatſoever (*a*)."

IT WAS ARGUED *in favour of the deviſe*, that there was nothing in the act to prevent papiſts from ſelling their lands; but the deſign of the act was rather to oblige them to ſell, and turn their real into perſonal eſtate; for the continuance of ancient ſeats in the hands of papiſts was eſteemed the chief bulwark and ſupport of
* [91] popery, thither reſorting jeſuits, &c. * If a *Roman Catholic* may ſell, he may certainly give away the money ariſing from the ſale to a Catholic. If now a papiſt may do this in his life-time, why may he not, as to the reaſon of the thing, appoint this to be done by truſtees after his death? If it be objected, that though the eſtate, being by the will appointed to be ſold, muſt be in common law looked upon as perſonal eſtate, yet it is land in equity, becauſe it is a known rule in equity, that the reſiduary legatees may come into the court of chancery, and pray that they may have the land, upon their paying the debts and legacies for payment of which the land was to be ſold. It may be anſwered, that if a perſon has his liberty to take either land or money, the Court will not compel him to

(*a*) But ſee 18. *Geo.* 3. c. 60.

take

take the land; for where then would be his liberty? Beſides, for the Court, as this caſe is, to decree him the land, were to take from him what the law allows him to take and enjoy, and give him that which an act of parliament diſables him from taking, and conſequently would altogether overturn the will of the teſtator. Neither is this the only caſe where this rule of equity may happen to fail; for ſuppoſe the ſurplus were deviſed to an alien, whom the law diſables to take land, ſhall this Court decree him the land, *that* which the law will not ſuffer him to enjoy? Should this be eſteemed as a real eſtate, it would follow that a *Roman Catholic* could not charge his lands with portions for younger children of his own perſuaſion, or payment of his popiſh creditors; becauſe, by the ſame rule of equity, if the land were but ſufficient for the payment of debts, &c. the creditor might come into a court of equity and pray the ſame thing. If it be objected, that the teſtator himſelf calls it land, for in the codicil he deviſes the remainder, "whether "in lands, &c.;" it * may be anſwered, that this was but the flouriſh of a lawyer's pen, and that if the will were complied with, there could be no remainder of any real eſtate. RADCLIFFE *againſt* ROPER. * [92]

Thus far it was argued, upon ſuppoſition that a *Roman* Catholic was, by this act of parliament; diſabled from deviſing real eſtates to a papiſt; but that he was not, it was argued to this effect: That this act of parliament, as to the firſt clauſe of it which reſpects thoſe under the age of eighteen, did not create an abſolute, but a conditional diſability only, *viz.* if after the age of eighteen he did not do ſo and ſo, &c.; and if he did not, it did not even then create a total and abſolute diſability, but only made *quaſi* a ſequeſtration of the profits during life, or non-compliance. Then comes the ſecond clauſe, which creates in every papiſt an abſolute diſability to purchaſe lands, &c. It is true, that, ſpeaking as a common lawyer, the word "purchaſe" ſtands oppoſed to "deſcent;" ſo that whatever eſtate a man does not come to by deſcent, he does by purchaſe, and then purchaſe neceſſarily includes deviſe. But it is not always taken in ſuch a comprehenſive ſenſe; and even in this court, the word "purchaſe" is frequently uſed by way of contradiſtinction to voluntary ſettlements. And that it is here to be underſtood in the vulgar and more common acceptation of the word, appears from the former clauſe, reſpecting infants; where the act makes uſe of the words "deviſe, limitation, and deſcent." Now had they underſtood the word "purchaſe" in the legal acceptation, that word alone might have ſupplied the place both of limitation and deviſe. Beſides, the words in the act immediately ſubſequent to purchaſe, *viz.* "in his name, or to his uſe, &c." ſeem to reſtrain and confine the word "purchaſe" to ſome act * to be done by the party to whom the eſtate moves, and not from whom. And then for the third and laſt clauſe, *viz.* "that all "and ſingular eſtates, terms, and other intereſts or profits what-"ſoever out of lands, from and after the tenth of *April*, to be made, "ſuffered, or done, &c.;" this clauſe ſhall not make a deviſee a purchaſer, becauſe it is not an independent clauſe, but explanatory * [93]

RADCLIFFE *againſt* ROPER.

of the foregoing; the word "ſuch" plainly coupling it to "that," to which it was only the addition of a penalty. For the preceding clauſe incapacitating a papiſt to purchaſe, it might be aſked, But what if he ſhould? Then comes this clauſe, and anſwers the queſtion, ſaying, it ſhould be void. To underſtand this clauſe in another manner were to ſet one part of the act at variance with the other. For whereas the firſt clauſe creates but a conditional diſability of taking by deviſe, *viz.* if they do not ſo and ſo, after the age of eighteen, &c. this clauſe thus underſtood makes an abſolute one.—All this was ſtrengthened by obſerving, that penal laws muſt receive the moſt mild and favourable interpretation.

ON THE SIDE *of the proteſtant heir at law* it was inſiſted, that this was a real deviſe, or a deviſe of land. For as to the objection, that this Court could not, in this caſe, decree the land to the reſiduary legatee, becauſe that would be for this Court to decree him what he is by this act unqualified for enjoying; it was anſwered, that before this act of parliament it would have been land in equity; and ſurely it cannot be pretended that there is anything in the act to alter it. It would be very ſtrange if this Court ſhould, after an act of parliament made for the preventing the growth of popery, make one rule for a proteſtant, and another in favour of a papiſt, and look upon the * ſame deviſe as real if made to a proteſtant, but as perſonal if to a papiſt. As for the caſe put, of remainder to an alien; it was anſwered, that an alien may take, but not for his own advantage, but that of the crown, who, in that caſe, would have the land. Land would even, at common law, paſs by the words "profits out of land;" but here the teſtator himſelf, in his codicil, calls it land, which makes it a ſtronger caſe; and then the word "remainder," which imports a fee, according to *Lutwyche*, 762. and makes it go to the heirs, not to the executors, ſhews, that it has the nature of a real eſtate, and was eſteemed of as ſuch by the teſtator. As for the objection, that this would fall hard upon younger children and creditors of papiſts; it was anſwered, that the deſign of the act was to lay difficulties upon *Roman* Catholics. And beſides, this caſe differs from that, becauſe it was here the caſe of a reſiduary legatee; and whether as to creditors and younger children it might not be conſidered as perſonal eſtate, though real to the reſiduary legatee; and whether becauſe the reſiduary legatees might pray to have the land, the creditors might do ſo too, the Counſel of the ſame ſide differed in opinion.

* [94]

And becauſe the Counſel for the proteſtant truſtees had argued, that if the deviſe was void as to the popiſh truſtees, the whole ſhould go to them, IT WAS URGED by the Counſel for the proteſtant heir at law, that the codicil was a revocation of the will. And to this purpoſe 1. *Roll. Abr.* 614. was cited, where land is deviſed to one, and after the ſame land is deviſed to the poor of the pariſh, who are incapable of taking; and it was held, notwithſtanding, the laſt deviſe was a revocation of the former.

As

RADCLIFFE *againſt* ROPER.

As to the act of parliament, that a papiſt was diſabled by it from taking land by deviſe, IT WAS ARGUED, * from the deſign of the act in general; which would be wholly vain, and by no means anſwer the end it was deſigned for, unleſs this interpretation was put upon it. Proteſtant heirs of popiſh anceſtors will be always diſinherited; and it will be very eaſy to conceal a gift under a deviſe; one need only ſuppoſe a papiſt makes his will, and enters into a bond not to revoke it. It ſeems ſtrange to imagine the legiſlators intended to leave *Roman* Catholics free to take land by deviſe, a way that coſts them nothing, and tie them up from taking land by purchaſe, a way in which they are to pay a valuable conſideration for it. It had been a more reaſonable intention to have incapacitated the papiſts from taking land this way, of all others. For making a will is a ſerious act, done often *in extremis*, at a time when men are more than ordinarily ſolicitous ſo to diſpoſe of their poſſeſſions, as they think, and will be told, at leaſt, by their prieſt, is moſt for the good of their ſouls, *viz.* to thoſe of their own communion. Unleſs this interpretation prevails, grown papiſts will be in a better condition than thoſe under age, which ſurely was never the intention of the law-makers.

As for its being a penal ſtatute; the queſtion is not about extending penalties, but whether the act ſhall not be in a manner uſeleſs. Beſides, penal laws made for the preventing public miſchiefs, have been, and may be, extended. As the ſtatute of 1. *Rich.* 2. that gives an action of eſcape againſt the warden of the *Fleet* only, extended, by equity, to all gaolers whatever. Statute of petty-treaſon for a ſervant to kill his maſter, extended to a miſtreſs.

1. *Rich.* 2.
Eſcape by equity.
Petty treaſon by equity.

The word "purchaſe" in a legal ſenſe includes deviſe; and legiſlators may well be ſuppoſed to be acquainted with the legal import of words.

9. Mod. 177.

* But the third clauſe was that relied upon, which (it was ſaid) was not explanatory, but an independent clauſe, referring to thoſe above the age of eighteen. For as for the word "ſuch," that did not make it explanatory of the preceding clauſe, but only referred it to the perſons ſpoken of before, *viz.* perſons profeſſing the popiſh religion. And beſides, it has a new commencement, a plain mark of its being a new independent clauſe. But ſuppoſing it an explanatory one, certainly the precedent clauſe is to be governed by the explanatory one, and not *vice verſa*. And, without doubt, the words in the third clauſe do include deviſe; for the words "profits out of lands" may be conſtrued of profits ariſing from ſale, as well as continuing profits. Certainly a deviſe to a papiſt will fall under theſe words, "eſtates, terms, intereſts, &c." to be made, done, or ſuffered, to the uſe, benefit, and relief of papiſts.

* [96]

NOTE, It was ſaid, that a purchaſe for a valuable conſideration could not be included under the word "relief," becauſe the worth being paid, it could not be deemed any relief; *contra* of a will.

In *Eaſter Term*, in the thirteenth year of *Queen Anne*, this cauſe came on again in the houſe of lords.

Poſt. 230.
1. Bro. P. C. 460.

MICHAELMAS

MICHAELMAS TERM,

The Eleventh of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir Thomas Powys, *Knt.*
} *Juſtices.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Robert Raymond, *Knt. Solicitor General.*

Lord Lanſdown's Caſe.

Caſe 56.

A codicil duly executed, with a deſign to the republication of a will, is a republication of the will, although the will was not re-executed purſuant to 29. *Car.* 2. c. 3.

THIS was an ejectment brought by three coheirs againſt *Lord Lanſdown.*

Upon a trial at bar, two points aroſe, which at length came to be found ſpecially, as appears from the following notes of what paſſed at the trial at bar.

The *Earl of Bath*, the common anceſtor, made his will, dated the twenty-fourth of *October* 1684, under which will *Lord Lanſdown* claims: This will was afterwards, in the year 1696, revoked by act in law, as to all the real eſtate deviſed by it, but not as to the perſonal. * Some years afterwards, the teſtator told *Mr. Nicholls*, who was then in the ſame coach with him, that he deſigned to republiſh his will; and the day afterwards, in the preſence of ſeveral people, he brought with him his will in one hand, and two codicils of the ſame import in the other, and ſaid, "*This* "is my will, by which I have ſettled my eſtate; and *this* I deſign "as a codicil to my will, to be taken as part and parcel thereof" Then the codicils were duly executed, according to the ſtatute 29. *Car.* 2. c. 3. of Frauds and Perjuries; and the will and one codicil were ſealed up in one paper, with the *Earl of Bath's* ſeal, and the other codicil in another paper, with the ſame ſeal; and theſe

S. C. Eq. Rep. 115. S. C cited Comy. Rep. 384.

Lord Lansdown's Case.

theſe papers were, after his death, produced by thoſe with whom they were depoſited. Neither the will nor the codicil were read at the time of republication. But in the codicil he took notice of his will in the following manner: "WHEREAS I made my will "in 1684, which I do not intend wholly to revoke; but in re- "ſpect of many alterations ſince happening, &c."

The queſtion was, Whether this amounted to a republication of his will, the will not being ſealed and ſubſcribed, as the ſtatute 29. *Car.* 2. c. 3. requires?

THE COUNSEL *for the plaintiff*, before it was found ſpecially, ſpoke to this point to this purpoſe:—When the will was revoked, it became a mere ſcroll; a paper, indeed, in which there was writing, but of no force, and no more capable of becoming a will, than any other paper whatever. It was held (*a*), even before the ſtatute of Frauds and Perjuries, that the inſerting of a new legacy, or the making another executor, did not amount to a new publi-
* [98] cation. * It appears from the caſe of *Sir Litton Strode v. Lady Falkland* (*b*), that the making a codicil, *quatenus* a codicil, is no new publication; for in that caſe, a man by his will deviſes "all "his lands;" afterwards he purchaſes other lands, and after that he makes a new codicil to his will, executed according to the ſtatute of Frauds and Perjuries; and whether this was a new publication of his will, ſo as to take in the lands after purchaſed, was the queſtion; and it was reſolved by LORD COWPER, *Chief Juſtice* TREVOR, and *Judge* TRACY, that it was not; for ſince the ſtatute of Frauds, the ſame forms are neceſſary to the republiſhing of a will, as to the firſt making. In *Trevanion's Caſe* (*c*), a man holds up a paper, and ſays, "this is my will;" and it was held that theſe words did not make it his will, becauſe it was not read; and this before the ſtatute of Frauds. No parol declaration referring to a paper in writing, would make a republication, even before the ſtatute of Frauds. This is plain from the caſe of *Bret v. Rigden* (*d*). And here is nothing pretended in writing, that imports a republication; for as for the words in the codicil, no one that reads them can think they do: and for the parol declaration, it was literally true; for it remained a will, as to his perſonal eſtate (*e*).

Caſe of Cotton v. Cotton, 2. Vern. 209. *contra.*

(*a*) 1. Roll. Abr. 618.

(*b*) 2. Vern. 625. 722. 3. Chan. Rep. 90. Powel on Deviſes 669.

(*c*)

(*d*) Plowd. 342.

(*e*) It is ſaid, that THE COURT held, that the making of the codicil was no republication of the will, they not being affixed together. Simpſon *v.* Hornby, Prec. Chan. 441. S. C. Gilb. E. R. 115. 120. S. C. 2. Vern. 722. and becauſe ſince 29. *Car.* 2. c. 3. there ſhall be no republication by implication, but the will muſt be re-executed; otherwiſe a deviſe of lands ſhall not be good, Acherley *v.* Vernon, Comy. Rep. 385. But ſee Abney *v.* Miller, 2. Atk. 599. Martin *v.* Savage, 5. Mod. 78. Gibſon *v.* Montford, 1. Vezey, 485. Acherley *v.* Vernon, Comy. Rep. 381.; in which laſt caſe it is held, that a codicil ſigned and publiſhed in the preſence of three witneſſes, is a republication of the will, and that both make but one will. S. C. 3. Bro. P. C. 107. See alſo Carlton *v.* Griffith, 1. Burr. 554. Pollen *v.* Pollen, 1. Vezey, 437. 442.

THE

THE SECOND POINT was, that ſuppoſing the will republiſhed, yet it could convey no title to the defendant, becauſe he claims as iſſue male to the deviſee in tail, *Bernard Granville*, who died, living the teſtator; and therefore it was a lapſed legacy (*a*).

If a deviſe be made to *A.* in tail male, and *A.* die in the life of the teſtator, a codicil, republiſhing the will, does not enable the iſſue in tail of *A.* to take under the deviſe.

THE COURT was of this opinion.

But THE COUNSEL inſiſting that this was a deviſe in tail, and therein different from the caſe of *Bret v. Rigden* (*b*); and that in this will the teſtator declares, that he ſo deviſed it "for the preſervation of his name and family;" and that the republication was after the teſtator * knew of the death of *Bernard Granville*, and therefore could not intend that *Bernard*, who was dead, ſhould take; and deſiring, upon their reputation, a *ſpecial verdict*, it was granted (*c*).

* [99]

THE COUNSEL for *Lord Lanſdown* offered in evidence parol declarations of the teſtator, that it was his intention the iſſue male ſhould take by the will.

Parol declarations not to be allowed as evidence to explain wills, unleſs in affirmance of the common law.

THE COUNSEL *for the plaintiff* oppoſed this;

And refuſed by THE COURT.

NOTE, The caſes quoted as to this purpoſe were, *Molineux v. Molineux* (*d*); where it is held, that if a will refer to a thing in writing, it is altogether as good as if the writing referred to were inſerted in the will *verbatim*: but that it is otherwiſe where the will refers to a parol declaration; for no regard is to be given to it, though it is referred to by the will (*e*). In the caſe of *Littlebury v. Buckley* (*f*), which was to this purpoſe, a rule had obtained in equity, that where there are ſpecific legacies, and no reſiduary legatee, that there the *reſiduum* ſhould be divided according to the ſtatute of Diſtributions, contrary to the common law, which gives

2. Vern. 98. 337. 339.

(*a*) The *Earl of Bath*, after taking notice in this will, that his lands were ſettled upon his ſons *Charles* and *John* in tail male, deviſed, "and in caſe my ſons "ſhall have no iſſue, then for the preſervation of my name and family, I "deviſe my ſaid lands unto my brother "*Bernard Granville*, and the heirs male "of his body iſſuing;" and *Bernard* died in the life of the teſtator, leaving iſſue *Lord Lanſdown*, the defendant. Comy. Rep. 384.

(*b*) Plowd. 342.

(*c*) Caſes cited in reſpect to this ſecond point, were Fuller *v.* Fuller, Cro. Eliz. 422. which caſe is alſo taken notice of in Mod. Rep. Steed *v.* Burier, in which caſe, reſolved by both Courts, that there is no difference between a deviſe in fee and in tail, as to this purpoſe.—NOTE *to the former edition*.—It is ſaid, that the Court were clear in their opinion on this point, that the heirs male of *Bernard Granville* could not take, no more than, in the caſe of Steed *v.* Burier, 2. Mod. 313. a grandſon could take as ſon by the republication of the will ſubſequent to the death of the ſon: Simpſon *v.* Hornby, Prec. Chan. 441. See alſo the caſe of Turner *v.* Kett, where it is determined, that if *A.* deviſe to *B.* and the heirs of her body, and for default of ſuch iſſue, then over; and *B.* die in the life-time of *A.*; and then *A.* by a codicil confirm his will; that the heir of *B.* takes nothing, though it appear that *A.* knew of the death of *B.* and of the birth of her ſon, before he made the codicil. 4. Term Rep. 601.

(*d*) Cro. Jac.

(*e*) See 2. Leon. 70. Cheney's Caſe, 5. Co. . and Bertie *v.* Falkland, before Lord Somers.

(*f*)

it

Lord Lansdown's Case.

2. Vern. 648. 737. 9. Mod. 9.

* [100]

2. Vern. 593.

it to the executor: now here the Court received parol evidence to prove it to have been the intention of the teſtator, that the executor ſhould have the *reſiduum*; and that it ſhould not be divided. But the reaſon why the Court did this, is expreſsly aſſigned to be, becauſe it was in affirmance of the common law; whereas here the evidence is offered in contradiction to the common law, *viz.* to enable * the iſſue to take *by purchaſe*, who by rules of common law was to take *by limitation*. This point was likewiſe fully ſettled in the caſe of *Litton v. Falkland* (*a*), that went through the houſe of lords. It was obſerved, that moſt of theſe caſes, being before the ſtatute of Frauds and Perjuries, ſtood only upon the ſtatute for Wills in writing, and muſt receive an additional force from the ſtatute of Frauds. Indeed if a man deviſe an eſtate to his ſon *John*, and there are two ſons of that name, or if a man deviſe the manor of *Dale*, and there are two of that name; parol evidence ſhall be allowed to explain which of the two the teſtator meant. The reaſon of the law in this point is clear and ſtrong; for if parol evidence be once allowed to explain a will, and give it another ſenſe than what can be collected from the words of the will ſtanding alone, what purchaſer under a will can be ſafe? or what lawyer can give his opinion upon a point that depends upon a will (*b*).

A ſpecial verdict was found (*c*).

(*a*) 2. Vern. 624, 625.

(*b*) See Raſnfield *v.* Careleſs, 9. Mod. 9. 2. Peer Wms. 158. Petit *v.* Smith, 1. Peer Wms. 7. Granville *v.* Beaufort, 1. Peer Wms. 114. Lake *v.* Lake, Amb. 126. Brown *v.* Selwin, Caſes T. T. 240. Coote *v.* Boyd, 2. Bro. C. C. 525. Clinton *v.* Hooper, 3. Bro. C. C. 201. Hornſey *v.* Finch, 4. Bro. C. C. 239.

(*c*) This caſe was afterwards agreed between the parties, Prec. Chan. 441.

Caſe 57. The Queen *againſt* The Borough of Aldborough.

The taking *the ſacrament* purſuant to the 13. *Car.* 2 c. . is a precedent qualification to being elected a burgeſs of a corporation.

THIS was a *mandamus* to the mayor and burgeſſes of *Aldborough*, commanding them to reſtore one *Sparhawk* to the office of capital burgeſs of that borough.

To this they return, for cauſe of not obeying the writ, that he had not taken *the ſacrament* within a year before the election, according to the ſtatute of 13. *Car.* 2. c. 2. (*a*).

* [101]

SIR JAMES MOUNTAGU objected to the return, that the act of 13. *Car.* 2. c. 2. as to taking the ſacrament, was only directory, as to the electors, what ſort of man they ſhould chooſe, and did not make a nullity of the office. * And to maintain this point, the caſe of *The King v. Larwood* (*b*) was quoted, which was an information againſt *Larwood* for not taking upon him the office of ſheriff

(*a*) See The Queen *v.* The Corporation of Buckingham, poſt. 173.

(*b*) Hilary Term, 6. *Will.* 3. 1. Salk. 168. 3. Salk. 134. 4. Mod. 269. Skin. 574. Carth. 306. Holt, 505. Comb. 315. 2. Vent. 248. 12. Mod. 67, 1. Ld. Ray. 29.

of

FREDERICK ALLIS

of the city of *Norwich*, of which office he was capable; he pleaded to the information, that he had not taken the ſacrament within a year, &c. and ſo was incapable; demurrer, and judgment on the ſide of the information. This is a caſe in point; for whether the not receiving the ſacrament created an incapacity, was the foundation of the demurrer.

THE COURT. This interpretation of the act was never offered to any Court before the caſe of *Rex v. Whitehorn* (*a*); and ſhould it prevail, the act would ſignify very little. As to the authority of the caſe of *The King v. Larwood*, it amounts to no more than this, that a man ſhall not defend one crime by another, *viz.* his not taking upon him the office, by his not receiving the ſacrament (*b*).

A SECOND OBJECTION to this return was, that it did not ſhew that this corporation was in being at the time when this act was made.

Stat. 13. *Car.* 2. extends to all corporations created before and after that act.

Sed non allocatur: for the act extends to all corporations created before and after. 2. *Ventris* 243.

A THIRD OBJECTION to this return was, that it did not appear that the perſon was *ſummoned* to ſay what he could for himſelf.

The return to a *mandamus*, that the party had not taken the ſacrament, ought to ſhew that he was *ſummoned* and *heard*.

TO THIS *it was anſwered*, that this return amounted to a ſpecial *non electus*, which muſt be as good as a general one, becauſe it did imply it; and to proye a general *non electus* would have been a good return, theſe authorities were quoted: *Dunch v. The City of Norwich* (*c*), where the return was *non debito modo electus*; and held there indeed, that the *debito modo* was * wrong, becauſe it made the party a judge of the legality of the choice; but without that the return had been good. In *Farrington's Caſe* (*d*), the return was *nunquam fuit electus et perfectus*; and leave was given to amend the return, by ſtriking the *perfectus* out.

Vide Salk. 436.

* [102]

PARKER, *Chief Juſtice.* I think it very proper a corporation ſhould hear a man before they expel him. There can be no inconvenience in holding corporations to this, for it can only keep thoſe in that are qualified to ſtay in: and if corporations will unjuſtly, after hearing, expel men, it aggravates the fault, becauſe done againſt knowledge. It is true, the party has an action to be reſtored; but then, in the mean time, he is wrongfully kept out.

POWELL, *Juſtice.* It is very reaſonable that corporations ſhall do this; but whether by law we can oblige them to it, is the queſtion. If a general *non electus* had been a good return, why not that which amounts to a ſpecial *non electus*? Surely the adding the reaſon does not make the return worſe.

No opinion given in this point.

(*a*) Ante, 64.

(*b*) See ſtatute 5. *Geo.* 1. c. 6. and the caſe of Harriſon v. Evans, Cowp. 393 *notis.* Kyd on Corporations, 352. 368.

(*c*) Eaſter Term 1706. 1 Sid. 203. reported likewiſe 1. Keb. 716.

(*d*) 1. Show.

Parker

Case 58.

Parker *againſt* Lilly.

If, after aſſignment of a *bond*, the aſſignor give a *warrant of attorney* to acknowledge ſatisfaction upon record, this is relievable only in chancery.

A MAN aſſigns his bond to *B.* *B.* ſues this bond in the name of the aſſignor, and has judgment. On a writ of error brought, the judgment is affirmed; and after execution is taken out, but before it was returned, the aſſignor gives a warrant of attorney to confeſs ſatisfaction upon record, which is accordingly done, and upon this *a ſuperſedeas* is taken out to ſtop the execution.

* [103]

S. C. 2. Eq. Abr. 343.

It was moved to ſet aſide the *ſuperſedeas*, * becauſe after aſſignment the Court will not ſuffer the aſſignor to give a warrant of attorney to acknowledge ſatisfaction; and for this 1. *Keble*, 803. was quoted.

But, as to this, it was ſaid, that the aſſignment was matter of equity, and was more proper for chancery than for this court; and a late caſe was quoted in the common pleas, where a bond was taken in truſt for another, and the obligee dying while the ſuit upon this bond pended, it was held that the *ceſtuy que truſt* could not go on in the action, becauſe this Court could not take notice of the truſt, or of any other plaintiff than who appeared to be ſo upon record.

And of this opinion was THE COURT.

Whether after execution a *ſuperſedeas* can iſſue without a Judge's hand.

IT WAS FURTHER INSISTED, in favour of the motion, that after execution was gone out, it was not regular to grant a *ſuperſedeas* without a Judge's hand.

THE COURT took time to inquire into the practice.

Case 59.

Ongly *againſt* Peed.

A deviſe to *A.* and his two brothers *ſucceſſivè*, is not void for uncertainty; for the law directs who ſhall take firſt.

THIS was A WRIT OF ERROR out of the common pleas.

THE CASE was no more than this: A man deviſed his land to *A.* and his brothers *ſucceſſivè*; but not to be entered upon or enjoyed by any of them until after marriage. *A.* was by the verdict found to be the eldeſt brother: and, Whether this will was void by reaſon of the uncertainty who ſhould take? was the queſtion.

S. C. 2. Ld. Ray. 1312.
S. C. 2. Eq. Abr. 538.
S. C. Comy. Rep. 297.
S. C. 8. Viner, 49.
4. Burn E. L. 116.

THE COURT were all of opinion, that the will was a good will, and certain enough; for being in the caſe of brothers, the common law was a guide to the expoſition of the word "*ſucceſſivè*," viz. that the eldeſt ſhould, after his * marriage, enjoy it firſt for his life, then the ſecond, and then the third; eſpecially when he who was named in the will, is by the verdict found to be the eldeſt brother;

* [104]

ther: had the deviſe been to *A. B.* and *C.* to take *ſucceſſivè*, it would have been void for the uncertainty (*a*).

ONELY *againſt* PEED.

(*a*) The caſes quoted in the argument were, Windſmore *v.* Hobart, Hob. 313. S. C. Cro. Eliz. 57. S. C. Godb. 51. S. C. Hutton, 87. Mellow *v.* May, Moor, 636. Forrett *v.* Frampton, Stiles, 434. Bate *v.* Amherſt, Raym. 82. and Co. Litt. 377.—NOTE *to former edition.*

Sawkill *againſt* Warman. Caſe 60.

THIS was an *inſimul computâſſet*: the count upon which the queſtion aroſe was, that upon an account taken the ninth of *January*, the defendant appearing to be indebted to the plaintiff in the ſum of one hundred and fifty pounds, promiſed payment upon the thirtieth of *January*.

When the plea ſhould be *actio non accrevit infra ſex annos*, inſtead of *non aſſumpſit*.

The defendant pleaded *non aſſumpſit infra ſex annos*.

To this it was demurred, becauſe the ſix years are to be computed from the time of the performance, and not of the promiſe; and therefore this plea might be true, and yet the plaintiff not barred by ſtatute of Limitations; and therefore the plea ſhould have been *actio non accrevit infra ſex annos*.

And of that opinion was THE COURT.

In *Hilary Term* following there was another caſe, parallel *in omnibus* (*a*).

(*a*) See the caſe of Shutford *v.* Penow, Cro. Car. 139. Buckler *v.* Moor, 2. Keb. 874. 1. Mod. 89. Gould *v.* Johnſon, 2. Ld. Ray. 838.

The Queen *againſt* The Inhabitants of Ware. Caſe 61.

IN *Tawny's Caſe* (*a*), which does not materially differ from this, the queſtion was, Whether a rate might be made to reimburſe an overſeer of a former year? and reſolved it could not; and upon this ground, that the preſent inhabitants are by law bound only to the maintenance of the preſent poor; for at that rate nobody that comes into a pariſh, can tell what he is to truſt to (*b*).

A rate cannot be made to reimburſe an overſeer of a former year.

S. C. Sett. & Rem. 48.

S. C. Foley, 10. S. C. 1. Bott P. L. 272.

(*a*) Salk. 531. Ld. Raym. 1011. 3. Mod. 98.

(*b*) See 17. *Geo.* 2. c. 38. ſ. 11.; and Mr. Conſt's edit. of Bott's Poor Laws, 274.

* The Company of Stationers *againſt* Partridge. Caſe 62.

THIS was a point of law, directed out of the court of chancery, for the opinion of the Judges of the court of king's bench.

The Company of *Stationers* has not an excluſive right to print *almanacks*.—S. C. 2. Chan. Caſes, 66. 76. 93. 2. Show. 258. 2. Bl. Rep. 1004. Lilly Ent. 63. 1. Mod. 256.

THE COMPANY OF STATIONERS *againſt* PARTRIDGE.

THE QUESTION was, Whether the grant of the crown, to the *Company of Stationers*, to have the ſole printing of *almanacks*, provided they were licenſed by the archbiſhop of *Canterbury* and biſhop of *London*, were a good grant; or void, becauſe againſt the liberty of the ſubject?

IT WAS ARGUED *againſt the patent*, that printing was a handicraft trade, and therefore no more to be reſtrained than other trades; for to ſay that the crown has a power over all trades, that may prove *malum per accidens*, would carry the prerogative of the crown nobody knows whither. Where the crown has no right of copy, it cannot appropriate the printing to particular perſons; but where the crown has a right to the copy, there it may; as in the caſe of the tranſlation of the *Engliſh Bible*, and *the Year-Books*. The king has an intereſt in the *Statute Book* (*a*); and the ſame may be ſaid of the *Book of Common Prayer*. In *Seymour's Caſe* (*b*) it is indeed ſaid, that *an almanack* is but a copy of the calendar, out of the Book of Common Prayer. In anſwer to this, *res altiùs repetenda*, before the Reformation, the Book of Common Prayer was ſubject to the alteration of THE ORDINARY; and there were almoſt as many Common Prayer Books as dioceſes, as appears from *Linwood* (*c*). Every biſhop had the appointing of the feaſts that were to be obſerved in his own church and dioceſe. In the *Year-Book* of *Henry the Seventh* (*d*) it is ſaid, that the * calendar is of no authority. So that before the Reformation, the calendar could be no creature of State; and as for the almanack's being ſaid to be a copy of the calendar, there is no reaſon for it; indeed both are regiſters of time, the one for prophane, and the other for ſacred uſes.—Then it was argued, that THE PATENT was void, becauſe introductory of a monopoly. Monopolies are ſaid to be contrary to MAGNA CHARTA (*e*). The liberty of the ſubject was precarious before MAGNA CHARTA (*f*). That ſtatute does not annul monopolies then in being, but prevented any more. A grant to make all playing-cards, has been adjudged to be a monopoly (*g*).

[106]

IT WAS ARGUED *for the patent*, that the crown had a peculiar right and intereſt in the Book of Common Prayer, and conſequently in the calendar, which is a part of it; and the making ſome additions to it, ſhall not deveſt the crown of their intereſt in it. Since the art of printing was found out, it has been more under the care of the crown than any other art whatſoever. FIRST, Becauſe it was an art introduced by the care of the crown; ſo ſaid in *Carter's Caſe* (*h*), which gives the crown a property in the trade. SECONDLY, Becauſe of the greatneſs of the inconvenience that may redound to the public from the miſmanagement of the

(*a*) See the caſe of the Stationers Company, 2. Chan. Caſes, 76.
(*b*) 1. Mod. 256.
(*c*) Lin. Oxford edition, 103.
(*d*) 9. *Hen.* 7. pl. 14.
(*e*) 2. Inſt. 47. See alſo Regiſter, 105. 107. about monopolies.
(*f*) Moor, 674.
(*g*) Darty *v.* Allen, 3. Mod. 76.
(*h*) 2. Keb. 731.

preſs.

THE COMPANY OF STATIONERS *againſt* PARTRIDGE.

preſs (*a*). On a controverſy about the printing of *Rolle's Abridgment*, it was decreed in chancery in favour of the patentees, and this decree was confirmed in the houſe of lords (*b*). In a queſtion about the patent for the ſole printing of all *law books*, judgment was given againſt the patentee in the court of king's bench, for the uncertainty of what ſhould be eſteemed a law book; but this judgment was reverſed in the houſe of lords (*c*): *Seymour's Caſe* (*d*) is full in point, where the ſame objections were made as here. In the caſe of *The Company* * *of Stationers v. Skinner* (*e*), the patent was allowed for Primers, Pſalters, Pſalms and Almanacks. In the caſe of *The Company of Stationers v. John Gale* (*f*), there was no decree indeed for printing Pſalms, Pſalters and Almanacks, but the reaſon was, becauſe the perſon controverting the patent ſubmitted without. In the caſe of *The Company v. Wright* (*g*), a patent for printing the Pſalms was allowed. In the caſe of *The Company of Stationers v. Lee* (*h*), another patent for Pſalms was allowed; and in the caſe of *The Company v.* ——, a patent for Almanacks (*i*). In the ſtatute 9. *Anne*, c. 20. this very patent now in queſtion, is taken notice of.

* [107]

THE COURT. The patent for the ſole printing of law books is not now to be ſhaken, having had the ſanction of the houſe of lords: monopolies are odious; this caſe, therefore, is to be diſtinguiſhed, by deriving to the crown ſome ſpecial intereſt in *almanacks*.

No opinion was given; but the caſe was ordered to be ſpoke to again (*k*).

(*a*) Carter's Rep. 89.

(*b*)

(*c*) See Roper *v.* Streater, Skin. 234. and the caſe of Baſket *v.* Univerſity of Cambridge, 1. Bl. Rep. 110. 4. Burr. 2316.

(*d*) 1. Mod. 256.

(*e*) 3. Keb. 792.

(*f*)

(*g*)

(*h*) 2. Show. 258. 2. Ch. Caſes, 66.

(*i*)

(*k*) As the Company of Stationers founded their claim in the right of the crown, the Court thought that it was incumbent on them to ſhew, that the crown had ſome property in the printing of almanacks, and the caſe ſtood over to afford them that opportunity, 4. Burr. 2329, 2382. But there never was any judgment or opinion given in this caſe. See Lord Mansfield's account of this caſe, 4. Burr. 2402. In the year 1775, however, the queſtion was revived in the caſe of The Stationers Company *v.* Carnan, and on a caſe ſtated out of chancery for the opinion of the court of common pleas, DE GREY, *Chief Juſtice*, GOULD, BLACKSTONE, and NARES, *Juſtices*, certified, FIRST, "That the grant made to the "plaintiffs, the Stationers Company, was "reſtrained to ſuch almanacks and progneſtications as ſhould be licenced or allowed by the *Archbiſhop of Canterbury*, "the *Biſhop of London*, or either of them, "for the time being."—And SECONDLY, "That the Crown had not a prerogative "or power to make ſuch grant to the "plaintiffs, excluſive of any other or "others." 2. Black. Rep. 1009.

The Queen *againſt* The Mayor and Burgeſſes of Pomfret. Caſe 63.

THIS was *a mandamus*, directed to the mayor and burgeſſes of *Pomfret*, to reſtore *William Lee* to the office of burgeſs.

A return to a *mandamus*, that the party removed was *duly elected*; that he was removed for *non-attendance*; and that his election was void by his not having taken *the ſacrament*; is bad for its repugnancy.

THE QUEEN *against* THE MAYOR AND BURGESSES OF POMFRET.

They returned, that he was ſuch a day *electus et perfectus*; and ſhew for cauſe of removing him, his *non attendance at the ſeſſions*; and then they ſay, that he had not taken *the ſacrament* within a year before his election, and that therefore his election was null and void.

THE COURT was of opinion that this return was bad, by reaſon of the repugnant and contradictory matter contained in it.

* [108] * For, FIRST, they return, that he was ſuch a day *electus et perfectus*; then ſhew for cauſe of removing him, his not attending at the ſeſſions, according to his duty; and then ſhew matter that proves him never to have been elected; and conſequently, that it was ſo far from being his duty to attend, that it would have been an act of preſumption for him to have done it: and though ſeveral cauſes may be returned, yet they muſt not contradict one another; according to the caſe of *Dunch v. The City of Norwich* (*a*).

Non-attendance at the ſeſſions no cauſe of forfeiture of a corporate office.

SECONDLY, They held, that *non-attendance at the ſeſſions* was not a good cauſe of removal: for though they agreed the difference taken, 9. *Co. Rep.* 99. between public offices, that concern the adminiſtration of juſtice, and private offices, *viz.* that *non uſer*, in the one, is no forfeiture without a requeſt, and ſome ſpecial loſs occaſioned thereby, as it is in the other; and that the office of burgeſs is a public office, &c. yet this caſe was different; for the abſence of a ſingle alderman does not hinder the holding of courts, or the validity of the acts of that court; ſo that here abſence does not amount to a *non uſer* of the office (*b*).

The 9. *Ann.* c. 20. makes no difference in *returns* to *mandamus's*.

THE COURT was likewiſe of opinion, that returns to *mandamus's* were to be kept to the ſame ſtrictneſs, ſince the *mandamus act* 9. *Ann.* c. 20. as before.

Peremptory *mandamus* granted.

(*a*) 1. Salk. 436. and ſee the caſes of Wright *v.* Fawcett, 4. Burr. 2041. Rex *v.* Churchwardens of Taunton, Cowp. 413. Rex *v.* Mayor of Cambridge, 2. Term Rep. 456. Rex *v.* Lyme Regis, Dougl. 157. Rex *v.* Mayor of York, 5. Term Rep. 66.

(*b*) See Serjeant Whitaker's Caſe, Salk. 434. Rex *v.* Carliſle, 1. Stra. 385. Rex *v.* Mayor of Leiceſter, 4. Burr. 2087. Rex *v.* Wells, 4. Burr. 1999. Rex *v.* Richardſon, 1. Burr. 317.

MICHAELMAS TERM,

The Eleventh of Queen Anne,

AT

The Sittings

IN

The Guildhall of London,

BEFORE

Sir Thomas Parker, *Knt. Chief Juſtice.*

Stennil *againſt* Brown.

Caſe 64.

A CONDEMNATION of a ſhip as prize, in the admiralty court of *France*, was attempted to be proved by *a copy* of the condemnation, ſubſcribed by the officer of the court.

The ſentence of a foreign court of admiralty can not be given in evidence, except under the ſeal of the Court.

But PARKER, *Chief Juſtice*, who tried the cauſe, would admit of no evidence, but an *exemplification* * of the condemnation under THE SEAL of the court. A copy of a rule of court, ſigned by the officer of the court, is no evidence in any other court, unleſs the Judge of the court ſet his hand to it himſelf; but at *Niſi prius* the hand of the officer is enough (*a*), becauſe it is the ſame court.

* [109]

Bull. N. P. 226. Sayer, 297.

(*a*) Bull. N. P. 229. 2. Ld. Raym. 743.

Nickſon *againſt* Brohan.

Caſe 65.

A MASTER ſent his ſervant, who was uſed to tranſact affairs of that nature for him, on *Saturday morning*, with a note drawn upon *Sir Stephen Evans*, with orders to get from *Sir Stephen* caſh concerns, with a note to a banker to receive the money, and the ſervant, inſtead of another perſon to give him a draft upon the banker for it, and the banker fails before the draft is preſented, THE MASTER is liable for the loſs.—3. Bac. Abr. 562. 2. Stra. 415. 2. Wilſ. 353. 3. Burr. 1516. 1. Bl. Rep. 485. 3. Term Rep. 760.

If a maſter ſend a clerk, who has the general management of his ſo doing, gets

NICKSON *againſt* BROHAN.

either bank bills, or money, and turn them into exchequer notes; but the ſervant having other buſineſs of his maſter's upon his hands, to ſave himſelf the time and trouble of going to *Sir Stephen*, went to *B.* and prevailed with him to give him a bank bill for the note upon *Sir Stephen*; and then in purſuance of his maſter's orders, inveſted it in exchequer notes, which he brought to his maſter, not letting him know but that he had gone to *Sir Stephen*. *Sir Stephen Evans* failed upon the *Monday* following.

The queſtion was, Upon whom this loſs ſhould light, *B.* or the maſter?

PARKER, *Chief Juſtice*, who tried the cauſe, was firſt of opinion that it ſhould fall upon *B.* becauſe the ſervant acted directly contrary to his maſter's orders, and *B.* by furniſhing the ſervant with a bank bill, did the maſter no ſervice at all; for if he had not done it, the ſervant muſt, in obedience to his maſter's orders, have gone and received himſelf the money from *Sir Stephen*; and cited
* [110] the caſe of *Ward v. Evans* (*a*), where it was reſolved, * that if a ſervant, ſent to receive money, takes a bill in lieu of it, the maſter is not bound by the act of the ſervant, unleſs the bill is anſwered.

But one of the jury informing him that he took the practice to be otherwiſe (for that whether a ſervant uſed to act upon the credit of his maſter, went againſt the orders of the maſter, was a fact that could not be known to a third perſon), he quitted his opinion; but directed the Counſel to move the court of king's bench, which was accordingly done.

The ſubſtance of what was ſaid upon the motion, in favour of the maſter was, that the ſervant going contrary to his orders, and there being no ſubſequent conſent of the maſter, who knew nothing of the matter, the act of the ſervant ſhould not bind the maſter, according to the caſes of *Ward v. Evans* (*b*), *Hanky v. Watts* (*c*), and *Thorold v. Smith* (*d*). A maſter commands his ſervant to ſell his horſe, the ſervant ſells him as a good one, no action againſt the maſter (*e*).

(*a*) 1. Salk. 442. 2. Ld. Raym. 928. Comy. Rep. 138. 6. Mod. 36. 3. Salk. 118. 12. Mod. 521. Holt, 120.

(*b*) Salk. 442.

(*c*)

(*d*) 10. Mod. 71. 87. Holt, 462. See the caſe of Southern *v.* How, Cro. Jac. 471.

(*e*) See Godb. 361. 2. Roll. Rep. 270. 1. Roll. Abr. 95. and the caſe of Fenn *v.* Harriſon, 3. Term Rep. 760. in which laſt caſe ASHHURST, *Juſtice*, ſays, "I take the diſtinction to be, that "if a perſon keeping livery-ſtables and "having a horſe to ſell, direct his ſervant "not to warrant him, and the ſervant "nevertheleſs warrants him, the maſter "will be liable on the warranty, becauſe "the ſervant was acting within the general ſcope of his authority, and the public cannot be ſuppoſed converſant of "any private converſation between "the maſter and ſervant: but if the "owner of a horſe were to ſend a ſtranger "to a fair, with expreſs directions not "to warrant the horſe, and the latter "acted contrary to the orders, the purchaſer could only have recourſe to the "perſon who actually ſold the horſe, and "the owner would not be liable on the "warranty, becauſe the ſervant was not "acting within the ſcope of his employment; for there is a wide diſtinction "between *general* and *particular* agents."

But

But THE COURT were all of opinion, that the verdict was well given, and that the maſter was chargeable, and he only; for a ſervant, by tranſacting affairs for his maſter, does thereby derive a general authority and credit from him; and if this general authority ſhould be liable to be determined for a time, by any particular inſtructions or orders, to which none but the maſter and ſervant are privy, there would be an end of all dealing but with the maſter. The maſter has put himſelf in the power of the ſervant, by truſting him with the bill. The caſe of *Monk v. Clayton* (*a*) was, where the act of a ſervant, though out of place, bound his maſter, by reaſon of the former credit given him by his maſter's ſervice, the other not knowing that he was diſcharged. And as for the caſes put, there was this main difference between them, that nothing came to * the maſter's uſe; as here the notes did. In ſome of thoſe caſes there was a prior debt, but none here. It was agreed by the Court, that the property of the note was not transferred and veſted in *B.* but was only in nature of a *depoſitum* or ſecurity to him, for there is no indorſement; nor could he have ſued upon the bill; and though practice cannot alter the law, yet it may explain an agreement. They were likewiſe of opinion, that the maſter could not recover it of the ſervant, the loſs being occaſioned by a mere accident, and not either folly or negligence. If a maſter frequently ſend a ſervant to market without ready money, ſo that the ſervant is truſted upon the maſter's account; if, in ſuch a caſe, the ſervant embezzle the money when he is ſent with it, and buy upon truſt, the maſter is chargeable; but not if he always is ſent with ready money (*b*).

NICKSON *againſt* BROKAN.

* [111]

(*a*) Molloy, 270. Cun. on Bills, 140. 625. Hazard *v.* Treadwell, 1. Stra. 506. Kendal *v.* Andrews, Eſpin. Dig. *penes.*

(*b*) See Southby *v.* Wiſeman, 3. Keb. 115.

Arne *againſt* Johnſon. Caſe 66.

AN ACTION was brought for theſe words ſpoken of an upholſter: "You are a ſoldier, I ſaw you in your red coat doing duty; "your word is not to be taken."

Action for words.

The words were ruled to be actionable; becauſe it is known to be a common practice for tradeſmen to protect themſelves againſt their creditors by a counterfeit liſting; nor can it be worth a tradeſman's while for any other purpoſe, but to defraud his creditors, by ſubjecting himſelf to the power of an officer. A ſoldier has by act of parliament, which the Court muſt take notice of, the privilege of not being held to ſpecial bail; and thoſe words, "your word is "not to be taken," are plainly an inference from the former.

Caſe 67. * Alice *againſt* Gale.

To *ſci. fa.* there maybe plea in bar or abatement.

FIRST, A man may plead in bar, or in abatement to a *ſcire facias*, as well as to other actions.

It is the concluſion, not the matter of the plea, that makes it a plea in abatement, or in bar. Show. 4.

SECONDLY, It is the concluſion of a plea, and not the matter of it, that makes a plea in abatement: ſo that ſhould a man plead a plea, that for the matter of it might have been pleaded in bar, and conclude *petit quòd breve caſſetur*, it would be but a plea in abatement; and the judgment could be no other than a *reſpondeas ouſter*. So *vice verſa*, a plea in abatement pleaded in form of a plea in bar, would be a plea in bar, though an ill one.

Concluſion to a bar in *ſcire facias*. 3. Term Rep. 285.

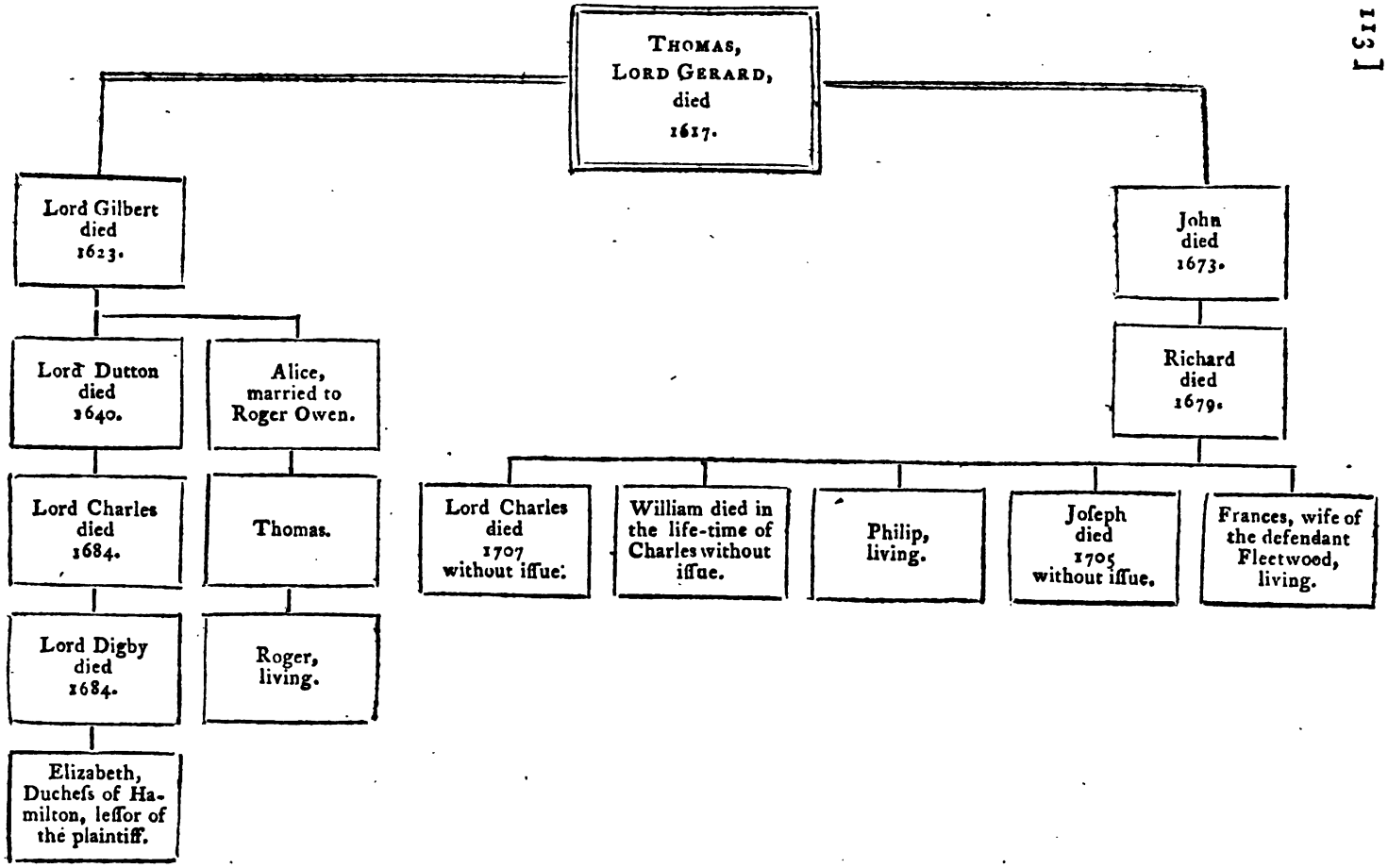
THIRDLY, To a *ſcire facias*, the plea in bar is always concluded by an *executio non*, as in other caſes by an *actio non*.

Diſcontinuance. Carth. 107. Salk. 177. 218. 3. Bac. Abr. 8vo. 28. 1. Wilſ. 302.

FOURTHLY, If a defendant plead a plea in abatement, and the plaintiff reply as to a plea in bar, this is a diſcontinuance.

HILARY

PEDIGREE OF THE CASE FOUND BY THE JURY.


Thomas, Lord Gerard, died 1617.
Lord Gilbert died 1623.
John died 1673.
Lord Dutton died 1640.
Alice, married to Roger Owen.
Richard died 1679.
Lord Charles died 1684.
Thomas.
Lord Charles died 1707 without iſſue.
William died in the life-time of Charles without iſſue.
Philip, living.
Joſeph died 1705 without iſſue.
Frances, wife of the defendant Fleetwood, living.
Lord Digby died 1684.
Roger, living.
Elizabeth, Ducheſs of Hamilton, leſſor of the plaintiff.

*HILARY TERM,

The Eleventh of Queen Anne,

IN

The Common Pleas.

Thomas, *Lord* Trevor, *Chief Juſtice.*
Sir John Blencowe, *Knt.*
The Hon. Robert Tracy, } *Juſtices.*
Robert Dormer, *Eſq.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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* Thornby, on the demiſe of the Ducheſs of Hamilton, *againſt* Fleetwood. Caſe 68.

THIS was an ejectment in the court of common pleas, which ended in a ſpecial verdict.

A *common recovery* ſuffered by a papiſt tenant in tail, for the purpoſe of making a marriage ſettlement, is good, for he is not "a purchaſer" within the ſtatute 1. *Jac.* 1. c. 4. ſ. 6. S. C. poſt. 356. 406. S.C. Comy. Rep. 207. S.C. 1. Str. 1. 318. S. C. 2. B ſo. P. C. 203. 11. Mod. 355. Harg. Co. Lit. 132. *notis.* 2. Peer Wms. 362.

The jury found, that *Charles*, the firſt *Lord Gerard*, in the month of *November* 1660, ſettled the eſtate in queſtion, to the uſe of himſelf and the heirs males of his body, with remainder * to the heirs males of the body of *Thomas* firſt *Lord Gerard*, remainder to his own right heirs. In the year 1684, *Charles*, the ſecond *Lord Gerard*, upon the death of *Digby*, *Lord Gerard* (only ſon of *Lord Charles*) without iſſue male, entered upon the eſtate in queſtion (not in jointure), claiming the ſame as heir male of the body of *Thomas*, the firſt *Lord Gerard*, by virtue of the ſaid limitation in that ſettlement; and by virtue of this title enjoyed this eſtate above twenty-two years, and the reſidue when the jointure fell in; and during the time of this his enjoyment, ſuffered ſeveral recoveries, and ſettled the eſtate upon his marriage in the year 1689, and died without iſſue in the year 1707, leaving *Philip*, his only brother then ſurviving, who is heir male of *Thomas*, firſt *Lord Gerard*, and is now living. *Charles* and his brother *Philip* were, in the year

THORNBY ON THE DEMISE OF THE DUCHESS OF HAMILTON, *againſt* FLEETWOOD.

year 1676, ſent by their father to *St. Omers*, and educated there for five years in the *Roman* religion, which religion they profeſſed. The laſt *Lord Charles* died in the year 1707, and upon his death the *Ducheſs of Hamilton* claimed the eſtate, as right heir of the firſt *Charles Lord Gerard*; notwithſtanding the eſtate-tail, limited to the heirs males of the body of *Thomas*, the firſt *Lord Gerard*, ſtill ſubſiſts in *Philip*; alledging, that the laſt *Lord Charles* and his brother *Philip* being ſent abroad, and educated in a popiſh ſeminary, are made ſo utterly incapable of taking any eſtate, that ſhe has the right of entry.

THE GRAND QUESTION was, Whether one brought up in a popiſh ſeminary, was, notwithſtanding any incapacity by him incurred on that account, ſtill capable of ſuffering a common recovery?

SIR THOMAS POWYS, *for the plaintiff*, inſiſted that the ſtatute 1. *Jac.* 1. c. 4. incapacitated a perſon ſent beyond ſea, not only from a pernancy of the profits, but from having the eſtate ever veſted in him; and * that this ſtatute, as to this point, ſtood unimpeached by the ſubſequent ſtatutes of 3. *Jac.* 1. c. 5. and 3. *Car.* 1. c. 2. (*a*). In the caſe of *Day v. Savage* (*b*) it is indeed ſaid, that an act of parliament may be void from its firſt creation, as an act againſt natural equity; for *jura naturæ ſunt immutabilia, ſunt leges legum.* But this muſt be a very clear caſe, and Judges will ſtrain hard rather than interpret an act void *ab initio.* The words of the 1. *Jac.* 1. c. . as to the incapacity are, "ſhall be "incapable in reſpect of himſelf only, but not his heirs or poſte- "rity, to have, inherit, or enjoy, any lands, tenements, goods, "chattels, &c." words ſo comprehenſive, as muſt take in all manner of ways whereby an eſtate can veſt in a man, unleſs reſtrained by ſome after-limitations. Now the words of reſtriction or limitation are thoſe, "in reſpect of himſelf only, but not his "heirs or poſterity." This rather confirms the diſability in him, according to the known rule, that *Exceptio firmat regulam in rebus non exceptis*; and though a ſaving may qualify and reſtrain the purview, yet it was never allowed to overthrow it quite. The purview ſays, "he ſhall not have, enjoy, inherit;" the ſaving, as is pretended, ſays, "he ſhall." This interpretation quite overthrows the intention of the reſtriction itſelf: for it was a ſaving intended in favour of the iſſue and poſterity; but according to this interpretation, the ſaving is fatal and prejudicial to them; for it gives the perſon ſo educated a power of alienating, which power he will very probably execute in caſe of a proteſtant poſterity; whereas, according to our interpretation, the eſtate never veſting in him, he cannot alien. As to the queſtion that will be aſked, Who ſhall have the eſtate in the mean time, if he is not to have it, and yet his iſſue, if he ſhould have any, muſt have * it after his

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[116]

(*a*) But ſee now the 18. *Geo.* 3. c. 60. and 31. *Geo.* 3. c. 32. (*b*) Hob. 87.

death?

death? I anſwer, There is a difference when the incapacity is in him, who is to take by *purchaſe*; and when in him, who is to take by *deſcent*. For where the firſt purchaſer is incapable, there none ſhall take that muſt derive their title under him; but where the incapacity happens in courſe of deſcent, there the eſtate will go over to him to whom it ſhould go, if the perſon made incapable were really dead. A tenant in tail has iſſue two ſons; the eldeſt is *a monk*, or *an alien*, or abjures the realm; in all theſe caſes the younger brother ſhall inherit (*a*). In *Lord Delaware's Caſe* (*b*), it is true indeed, that he did not ſit in the houſe of lords in his father's life-time; but to this it may be anſwered, that it did not appear the ſon ever attempted it (*c*), and ſo brought it legally in queſtion; and that there is a great difference made between a title of honour, which may be ſuſpended, and a freehold, which cannot. Had our caſe been that of a heir, there had been more difficulty in it, becauſe of that maxim in law, *Non eſt hæres viventis*; though even then the word "heir" may, in an act of parliament, be underſtood in the vulgar acceptation of the word, *viz.* "heir apparent." It may be objected from the clauſe, "that if ſuch a one ſhall conform, &c. that from and during the time of ſuch his conformity, "he ſhall be freed and diſcharged from the afore-mentioned incapacity," that this proves the eſtate to have been in him before. But to this it is anſwered, that the intention of the proviſo was, that after the time of his conformity, he ſhall be capable of taking any eſtate that ſhould afterwards come to him; not that he ſhall then have that very eſtate, which at the time when it deſcended he was incapable of taking, and by reaſon of this incapacity never veſted in him, and was now actually veſted in another. But, admitting that to be the meaning of the proviſo, the inference is by no means juſt. For nothing is more common * than for eſtates to deveſt out of one, and veſt in another; as where a man dies, leaving his wife big with a ſon, &c. (*d*). It was urged further in favour of this interpretation, that the very ſame words that were made uſe of with reſpect to diſabling him in real eſtate, were made uſe of to diſable him in perſonal eſtate, and that therefore they muſt have the ſame interpretation; but to underſtand them of taking the profits of goods, money and chattels, &c. is abſurd. It was ſaid, that this interpretation was more agreeable to common ſenſe, and what every body but a lawyer would make. It was obſerved, that the other interpretation quite took away the penalty of the act; for who will be at the coſt and trouble of a ſuit to hinder ſuch a perſon from enjoying the profits, when by alienation he may in a moment exclude him from all advantages of his ſuit? *Summa eſt lex quæ pro religione facit*; acts of parliament made for the advancement of religion, muſt receive as ſtrong an interpretation for the attainment of that end as poſſible (*e*); and ſurely, it cannot be doubted but the act we are now upon is ſuch a one. Again,

* [117]

(*a*) Belknap's Caſe, Co. Lit. 132.
(*b*) 11. Co.
(*c*) Co. Lit. 155.
(*d*) The caſe of Lincoln College, 3. Co.
(*e*) Hob. 157.

it

THORNBY, ON THE DEMISE OF THE DUCHESS OF HAMILTON, *against* FLEETWOOD.

where * an act gives a penalty, but does not say to whom, there the crown shall have it. It is true, that where a penalty is given by way of damage, that there, though not said to whom, the penalty shall follow the loss; and this difference is taken, 2. *Ventris*, 267. *Moore*, 238. This is not an interpretation that lowers the penalty of the act; for what is the land but the profits of the land? And a grant of the profits, does even in law carry the land along with it; and certainly, nowhere could the pernancy of the profits be lodged better than in the crown: Who so zealous and able to put the law in execution? *Tutissima est custodia quæ sibi creditur.* Before the statute of 26. *Hen* 8. c. 13. by which entailed land was forfeited for treason, the land was preserved, in case of treason, to the children, by general, and as *Lord Hobart* 340. terms them, cunning words. And if tenant in tail, before those laws in *Hen.* 8. had, after forfeiture for treason, been vouched in a common recovery, the recovery would have barred the issue. As to the cases brought to prove, that there is no difficulty for estates to devest out of one and vest in another, as in case of an after-born child, &c. it may be answered, that these cases are not to the purpose; because it is the same estate that is devested out of one, and is vested in another; but here we are in the case of a remainder, which is another estate. It is against the rules of law, that *Philip* should be dead as to the remainder-man, but alive in respect to his issue, if he should have any; and that the same estate should cease as to one, and revive as to another *(a)*. It was observed, that this act disabled him from purchasing with respect to himself only, but not with respect to his issue; and that he might purchase to lose the profits, but not to retain them; and that if this interpretation might be put upon the word "purchase," it

*[122] must * likewise be put upon the word "inherit," for they are joined both together. It was added, in favour of this interpretation, that a person attainted may take by descent; but then indeed it is not for his own advantage, but that of the crown. So for the alien. The same law as to a villain, for the advantage of his lord. And surely *Charles*, or *Philip*, is not in a worse condition than aliens, villains, and persons attainted. As to what was said to *Lord Delaware's Case*, that had he attempted it, he might possibly have sat in the house of lords, living his father; it seems a strange punishment, that the father should not be allowed to sit in the house of lords himself, but he may send his son thither, to act and vote just as he himself would do. As to the interpretation put upon the clause concerning conformity, that this comes too late after the descent of the estate; it does in a manner subvert the chief design for which the clause was put in, *viz.* an encouragement to conformity. For children are sent over very young; and if, after the descent, no advantage is to be gained by conformity, there will remain but little time wherein this clause can be any inducement to them to conform. As to the objection, that this interpretation

(*a*) Beaumont's Case, 9. Co. 140.

gives

gives them a power of alienating; it may be ſaid, that this power is not properly given, but only remained as a conſequence of the eſtate that was ſtill in them. And even the ſtatute of 11. *Will.* 3. c. 4. does not go about to reſtrain a papiſt from alienating.

As to THE SECOND POINT, *viz.* that the ſtatute 1. *Jac.* 1. c. 4. ſtood repealed by reaſon of the inconſiſtency there was with the ſubſequent ſtatutes; it was ſaid, that all the three ſtatutes had the ſame end in view, but differed in the means of promoting it. * It was denied, that a repeal by implication is any reflection upon the legiſlators; nothing is more common than to repeal in one ſeſſions, laws made in another. How many laws are made temporary upon this very conſideration, that they are not ſure how well they will anſwer the deſign of their inſtitution? In a word, it is no reflection, that men are but men. As to what was urged from the occaſion of making this act, *viz.* the *Gunpowder Treaſon*, it was acknowledged that the deſign of the parliament was rather to lay more hardſhips upon the papiſts, and make more effectual laws againſt them; and accordingly three great defects in the act of 1. *Jac.* 1. c. 4. are all ſupplied by the 3. *Jac.* 1. c. 5. The firſt defect is, that 1. *Jac.* 1. c. 4. hinders not but that perſons might be ſent abroad to be bred papiſts, provided they were not ſent to ſeminaries and colleges, &c.; but 3. *Jac.* 1. c. 5. provides againſt this. Secondly, The penalty not being given to the informer, there was no encouragement to proſecute upon the act; but this is altered by 3. *Jac.* 1. c. 5. Thirdly, The act is ſilent who ſhall take the profits in the mean time; and though they muſt therefore go to the king, yet he is, according to the phraſe of our Books, *occupatus de arduis negotiis regni*, and will often let ſuch matters eſcape his notice; but this is ſettled by 3. *Jac.* 1. c. 5. in the next of kin. According to the interpretation which the plaintiff would put upon the ſtatute 1. *Jac.* 1. c. 4. it may happen, that a *Roman* Catholick, unfortunately happening to have a foreign education, ſhall be excluded, only to make way for a rigid papiſt bred at home. The ſtatute 3. *Car.* 1. c. 2. goes further than any of the former; the purview is greater, and ſo is the penalty.

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As to the objection, that the 3. *Car.* 1. c. 2. takes notice of the ſtatute 1. *Jac.* 1. c. 4. as a law in force and fit to be put in execution; and that ſuppoſing it was repealed by the 3. *Jac.* 1. c. 5. it would ſtand revived by the ſtatute 3. *Car.* 1. c. 2.; it was anſwered, that it was not repealed by 3. *Jac.* 1. c. 5. in the whole, but in part only; that the act 1. *Jac.* 1. c. 4. * contains ſeveral proviſions that are not either in 3. *Jac.* 1. c. 5. or in the 3. *Car.* 1. c. 2. as, firſt, It is very penal upon the officer of the ports who ſhall ſuffer them to paſs; ſecondly, It is very penal upon the maſter of the ſhip; and thirdly, upon the mariners. And for the ſake of the unrepealed clauſes, the ſtatute 3. *Car.* 1. c. 2. takes notice of the act, as an act ſtill in force, and what ought to be put in execution.

* [124]

THORNEY, ON THE DEMISE OF THE DUCHESS OF HAMILTON, *againſt* FLEETWOOD.

Then a great deal of time was taken in proving the act 1. *Jac.* 1. c. 4. to ſtand repealed by 3. *Jac.* 1. c. 5. from the inconſiſtencies of the one act with the other.

After this it was inſiſted upon, that there had been ſeveral *general pardons*, and one particularly in the year 1690, by which the offence being pardoned, the diſability was ſo *ex conſequenti*; and this pardon coming out before the death of *Charles*, viz. before *Philip*, now living, could make his claim, muſt have the ſame effect, with reſpect to him, as his conformity would; and for this purpoſe 3. *Levinz*, 332. was quoted.

It was further urged, that *Charles* by his entry had gained a tortious fee, which was ſufficient, until defeated, to maintain the recovery. 3. *Rep.* 59. *Hobart*, 262. If land be given to *an alien* in tail, and the alien ſuffers a common recovery, the recovery is good; for an alien is a good tenant to the *præcipe*, until office found. The ſame law for a perſon attainted. *A monk* is indeed ſaid to be dead in law; but that is a mere contrivance for the advantage of the papal grandeur; for if the monk ſhould be afterwards made a biſhop, he is then alive to purchaſe for the benefit of his church: for, as *Lord Coke* informs us in another place, the rule is to be interpreted for the church, not againſt it. If now *Charles* may be allowed to purchaſe for the advantage of his iſſue, as a monk for that of the church, the caſe of a monk will be an authority for us; for *Charles* by his entry while incapacitated, committed an act of diſſeiſin, which may be conſidered * as a new purchaſe, a word uſed in the act 1. *Jac.* 1. c. 4. *Goldſborough*, 102. 4. *Leon.* 84. Many are the authorities which prove a monk may be diſſeiſor; but it particularly appears to be ſo by this, that a *writ of aſſiſe* lies againſt a monk, the judgment in which writ is *quòd recuperet ſeiſinam*, which ſuppoſes a monk to have a freehold. It was added, that common recoveries are favoured in law, eſpecially when ſuffered in favour of a purchaſer for a valuable conſideration, which is the preſent caſe, being that of a marriage with ten thouſand pounds portion, beſides twenty-five years unmoleſted poſſeſſion under the common recovery (*a*).

* [125]

(*a*) After theſe arguments in the court of common pleas, judgment was given for the defendant. See 1. Stra. 320 to 328. On this judgment a writ of error was brought in the court of king's bench, which was argued in Hilary Term, 3. *Geo.* 1. S. C. poſt. 356. and again in Trinity Term, 4. *Geo.* 1. S. C. poſt. 406. See alſo Stra. 346. 352. a third and fourth argument; after which the Court took time to conſider, Stra. 365. And in Hilary Term, 6. *Geo.* 1. the Judges gave their opinion *ſeriatim*; and the Court being equally divided, the judgment, upon the conſent of the plaintiff in error, was affirmed, S. C. Stra. 383. A writ of error was brought to the houſe of lords, where, after hearing argument by Counſel, and the opinions of eleven of the Judges, the judgments of the common pleas and king's bench were affirmed. S. C. 2. Brown's Caſes in Parl. 216.

HILARY TERM,

The Eleventh of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir Thomas Powys, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

Caſe of Univerſity of Cambridge.

Caſe 69.

AN ACTION OF ASSAULT AND BATTERY was brought againſt one of the members of the Univerſity of *Cambridge*, and a general imparlance given from one Term to another.

The chancellor of the Univerſity comes and claims conuſance of the pleas, by virtue of a charter in *Queen Elizabeth*'s time, whereby *cognitio placitorum*, with excluſive words *non alibi*, *&c.* was given to the court of the vice-chancellor, to proceed *ſecundum legem et conſuetudinem Univerſitatis*, in all caſes where any of the body of that Univerſity ſhould be defendants; which charter was confirmed by act of parliament, of which they produced a copy.

And, Whether this claim ſhould be received? was the queſtion.

MR. PAGE, MR. LECHMERE, and MR. WHITAKER, argued thus that it ſhould not. It was ſaid, and admitted to be ſo by the Court, that ſuch a grant was not good of itſelf, without the help of

The Univerſity of *Cambridge* had a charter granted to them by *Queen Elizabeth*, whereby *cognitio placitorum*, with excluſive words *non alibi*, *&c.* was given to the court of the vice-chancellor, to proceed *ſecundum legem et conſuetudinem* of the Univerſity, in all caſes where any of the body are defendants; which charter was confirmed by parliament: reſolved, that after imparlance it was too late to make that claim.—S. C. 1. Stra. 557. S. C. 2. Ld. Ray. 1334. S. C. Fort. 202.

CASE OF UNIVERSITY OF CAMBRIDGE.

an act of parliament. For though the crown may *grant conusance of pleas to proceed *secundum legem terræ*, it cannot to proceed by other laws; for that would be to make new laws, which the crown, as being but one branch of the legislative power, cannot do. A copy of an act of parliament is no evidence, unless the act had been before allowed of, and so made a record of this court; for otherwise nothing shall be allowed of, as a sufficient evidence of the act, but the exemplification of it under the great seal. And the reason is, because the Court is party, which cannot pray *oyer* as the party may; so that the Court would be in a worse condition than a common person, if they were to receive for evidence a copy offered them. 35. *Hen.* 6. c. 14.

And this was allowed to be so PER CUR.

In the case of *Castle v. Litchfield (a)*, conusance of pleas is said to be of three sorts: FIRST, *Tenere placita*: and this is where the courts are co-ordinate, and have a concurrent jurisdiction; in which case, priority of suit only gives one court the preference to the other. SECONDLY, *Cognitio placitorum*: and this must be limited as to place. THIRDLY, *Cognitio placitorum* with exclusive words "*et non alibi*:" and this may follow the person, and need not be confined to any place. The difference between *cognitio placitorum* without exclusive words, and when with, is not, that the last has an exclusive jurisdiction, the former not; for *cognitio placitorum* does, *ex vi termini*, exclude all other courts, and imports the words "*et non alibi (b)*." But FIRST, The difference is, that the former must be local, confined to some place; the latter
* [127] may follow the person, and be as to place universal. * SECONDLY, In the former, if the lord waive his privilege, there shall be resummons, and proceedings shall begin where they left off; but in the latter, in case of waiver, or the like, the proceedings in the court excluded by this jurisdiction must begin *de novo*. THIRDLY, The former is for the advantage of the lord only, and therefore the lord only can claim it, and not the party; but where there are exclusive words, the party may claim it as well as the lord. In *Moore*, 249. 276. 9. *Hen.* 7. fo. 10, 11, 12. these differences are fully and clearly laid down. Here it was observed, that the third sort of conusance of pleas, which was with exclusive words "*et* "*non alibi*," that even this did not go so far as to make a nullity of proceedings in courts of law.

Then it was said, that this claim, being made after imparlance, was too late, and that the University had lapsed their time. In *Rastall's Entries (c)*, all claims of *cognitio placitorum* are entered before imparlance. It is too late to claim conusance of pleas after essoin, and by parity of reason after imparlance (*d*). Though an

(*a*) Hard. 505.

(*b*) Palm. 406. Roll. Abr. 489. Terms of Law, title "Conusance."

(*c*) Rastal, 128

(*d*) The Year-Books 3. *Hen.* 6. fo. 10. 14. *Hen.* 4. fo. 20. 16. *Hen.* 7. fo. 16. 5. *Edw.* 2. fo. 159. 35. *Hen.* 6. fo. 24. and the case of the University of Oxford, Show. 352.

imparlance

imparlance be only given to a day in the ſame Term, it was doubted whether, even upon ſuch an imparlance, it was not too late to pray it (*a*) ? Plea to the juriſdiction not to be received after an imparlance; and this claim of conuſance of the ſame nature with that plea (*b*). This difference is laid down (*c*) with reſpect to the time of claiming conuſance, that where the matter is local, ſo that it appears upon the face of the record that there is ground for ſuch a claim, it muſt be made *primo die*, viz. when the writ was returned; but where the matter is tranſitory, it muſt be made upon the day given to plead. And the reaſon of all theſe caſes is this, that otherwiſe there would * be a great delay of juſtice, unleſs ſuch claims are made as ſoon as poſſible. In the report of the caſe of *Caſtle v. Litchfield* (*d*) it is ſaid, that upon notice (indefinitely) the Court muſt ſurceaſe their plea; from whence it is inferred, that the time of notice is not material: but MR. LECHMERE produced a better report of that caſe in manuſcript, whereby it appeared, that nothing ſaid in that caſe could warrant ſuch an inference. From this manuſcript it was obſerved, that the *quo minus*, a deviſe to entitle common perſons to ſue in the court of exchequer, did not take away ſuch privilege, if demanded before imparlance. It was alſo obſerved, that THE LORD CHANCELLOR is included under the word "*Juſticiarius.*" If it ſhould be objected, that theſe authorities are not to the purpoſe, becauſe it was not the ſame kind of conuſance that was claimed in them as here; it may be anſwered, that there is nothing in the nature of the conuſance now claimed that can give the leaſt ſhadow of reaſon why longer time ſhould be allowed for claim here than in thoſe. For, firſt, though ſome of them ſhould be only conuſance of pleas without exclusive words, yet that can make no difference, ſince *ante oſtenſum* that *cognitio placitorum* does, *ex vi termini*, import an exclusive juriſdiction. Secondly, The difference between theſe two, that the latter, *viz.* that now claimed, is for the advantage of the party as well as the lord, and may therefore be claimed by the party as well as the lord, is rather a reaſon why leſs time ſhould be allowed for this claim, than why more. Thirdly, This being a claim of a conuſance, where the proceedings are to be, not *ſecundum legem terræ*, but *Univerſitatis*, ought rather to be diſfavoured, and have leſs time allowed for that claim than where the proceedings are to be *ſecundum legem terræ*. This reaſon * is given (*e*) for the reſumption of many franchiſes, that they are derogatory to the prerogative, and tend to the delay of juſtice.

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3. Salk. 383.

[129]

IT WAS ARGUED *on the ſide of the Univerſity*, that though there is good reaſon why there ſhould be a time fixed, as ſoon as poſſible, for the party himſelf to make his claim, yet there is no ſuch reaſon for the Univerſity, who is a ſtranger to the whole proceeding, to be ſo bound down. It was ſaid, that this was a perſonal privilege, and therefore the perſon might be arreſted out of the juriſdiction

(*a*) Year-Book 6. *Hen.* 7. 9.
(*b*) The Biſhop of Ely's Caſe, 1. Sid. 103.
(*c*) Year-Book 21. *Hen.* 4 41.
(*d*) Hardres, 505.
(*e*) Year-Book 27. *Hen.* 8. c. 24.

CASE OF UNIVERSITY OF CAMBRIDGE.

of the Univerſity; ſo that it was almoſt not poſſible, at leaſt not probable, that the Univerſity ſhould have notice time enough to make their claim before imparlance. It was urged, that this was a charter of very extenſive words, and confirmed by act of parliament; and was therefore to have an advantageous interpretation. After imparlance, a plea of ancient demeſne (a plea of the ſame nature) was received (*a*). *Juſtice* WINDHAM uſed to ſay, it was very hard that a ſtranger ſhould be bound to claim before imparlance (*b*). And to the caſes quoted by the other ſide this general anſwer was given, that they were little to the purpoſe; all of them, almoſt, relating to conuſances that had no excluſive words.

THE COURT were all of opinion, that the claim being made after imparlance was made, was too late; that the act of parliament was out of the caſe; for that related only to the matter of the conuſance, and was only neceſſary to ſupport a charter, which the crown had no power to grant; for though the crown may grant conuſances, yet it cannot grant them with power to proceed by
* [130] any other law than the common law. But as * to the time and manner of claiming, the act is wholly ſilent; theſe therefore are to be governed by the rules of law. Hence it is, that it is neceſſary for this privilege to be pleaded (*c*); and there is no reaſon in the world why the rules of law ſhould not govern as well the time of pleading it, as make it neceſſary for it to be pleaded at all. There is no difference, in the reaſon of the thing, between conuſances with excluſive words and conuſances without, as to this point; and therefore all theſe were eſteemed good authorities (*d*).

(*a*) Cro. Car. 9, Stiles, 90.
(*b*) 1. Lev. 89.
(*c*) See Paternoſter *v.* Graham, Stra. 810. Foſter *v.* Hexam, 1. Ld. Ray. 427.
(*d*) See Leaſingby *v.* Smith, 2. Wilſ. 413. Wills *v.* Trehern, Bar. 346. Rex *v.* Agar, Burr. 2820. Kendrick *v.* Kynaſton, Black. Rep. 454.

Caſe 70.

Mitchell *againſt* Reynolds.

A bond conditioned that the obligor ſhall not exerciſe his trade within a particular pariſh is good.
S. C. ante, 27. 85.
S. C. Fort. 296.
S. C. 1. Peer. Wms. 181.

THE RESOLUTION OF THE COURT was delivered by PARKER, *Chief Juſtice*, to the following effect:

An action of debt is brought upon a bond thus conditioned: "THAT WHEREAS *A.* had taken the ſhop of *B.* who was a baker, "for the term of ſo many years, and had given *B.* ſo much money "for it, THE CONDITION OF THE OBLIGATION was ſuch, "That if during the term aforeſaid *B.* ſhall not exerciſe the trade "of a baker within the pariſh where the ſhop was, that then the "bond ſhall be void; otherwiſe remain in full force, &c."

And, Whether this be a good or a void bond? was the queſtion.

WE ARE ALL OF OPINION, that the bond is good, and that the true diſtinction is not between *a bond* and *a promiſe*; that a bond ſhall be void and promiſe good; but between contracts, whether by bond

bond, covenant, or promiſe, entered into upon a juſt, fair, and reaſonable conſideration, and thoſe entered into upon no conſideration or a vicious one, whether it be by bond, covenant, or promiſe, that the former will be good, the latter void.

* Caſes of reſtraint of trade are either involuntary or voluntary. * [131]

Involuntary are of three ſorts: FIRST, By grant or charter; SECONDLY, Cuſtom; THIRDLY, Bye-laws.

FIRST, By a new charter granted (*a*). The grant of the ſole uſe of a trade is void (*b*), but a grant of a trade newly-invented, and for a time, is good (*c*); for the public has an advantage in the invention of a uſeful trade, which after a limited time is to be public; and the inventor's induſtry is ſufficiently encouraged by the ſole uſe of it ſecured to him by charter for ſuch a time: but a ſecond grant would be void, even in this caſe; and the ſtatute 21. *Jac.* 1. c. 3. limits the time for which ſuch grant may be made to fourteen years.

SECONDLY, By cuſtom: and this is either, FIRST, for the advantage of ſome particular perſon that has ſtock enough to ſerve the place (*d*); or, SECONDLY, for the advantage of the corporation or community of a certain place (*e*); or, THIRDLY, where perſons not ſuppoſed to uſe the trade have yet a prerogative, that nobody ſhall uſe ſuch a trade within ſuch a compaſs, without licence from them firſt obtained; and this is *ratione dominii* (*f*).

THIRDLY, By bye-laws. Bye-laws to exclude foreigners, where there is no cuſtom to juſtify them, are void (*g*); but if in affirmance of a cuſtom, they are good (*h*). Bye-laws to cramp and lay difficulties upon trade are void (*i*); but bye-laws to regulate trade are good, whether they are for the advantage of the town (*k*), or of trade (*l*).

Now I come to voluntary reſtraints: and here,

FIRST, All contracts for reſtraint of trade over all *England* are void, whether by bond, covenant, or promiſe; whether * of that trade a man is brought up to, or any other trade he afterwards falls into (*m*). * [132]

SECONDLY, Contracts to reſtrain trade in a particular place are void, if not done upon a fair, juſt, and good conſideration (*n*).

(*a*) 8. Co. 121.
(*b*) 11. Co. 84.
(*c*) Godb. 125.
(*d*) 2. Bulſt. 135. 1. Roll. 561.
(*e*) Dyer, 279. Jones, 162. Carter, 114.
(*f*) See the caſe of the Archbiſhop of York, Reg. 105.
(*g*) Carter, 68. 114.
(*h*) 1. Roll 364.
(*i*) Moor, 576. 1. Bulſt. 11. and ſtatute 20. *Car.* 2. c.
(*k*) 1. Sid. 284. Raym. 288.
(*l*) 5. Co. 62. 2. Keb. 309.
(*m*) Cro. Eliz. 872. Cro. Jac. 596. Allen, 67.
(*n*) See the Year-Book 2. *Hen.* 5. pl. 5. and the main point to this caſe, Moor, 115. 242.

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THIRDLY. Where the contract for the reſtraint of trade in a particular place appears to have been made upon a fair and juſt conſideration, the contract is good, be it by bond, covenant, or promiſe (*a*). In *Joliffe v. Brode* (*b*), a remarkable caſe, the plaintiff and defendant were mercers, living near to one another; the defendant deſired the plaintiff to buy his old goods, which the plaintiff did at ſuch a price, upon conſideration that the defendant would not exerciſe his trade within ſuch a place. In this caſe it was FIRST obſerved, that it was a voluntary reſtraint; and the rule is, *Volenti non fit injuria*; SECONDLY, that it was made upon a valuable conſideration; the uſe of his trade being compenſated to the defendant by the price given him for his old goods; THIRDLY, That the agreement was neither *malum in ſe*, nor *malum prohibitum*; FOURTHLY, A man may bind himſelf not to live in ſuch a place, and by conſequence not to trade there; and, FIFTHLY, Theſe kinds of bonds are very frequent in *London*. In this caſe the material difference I firſt laid down is eſtabliſhed; and the judgment in this caſe, as appears, was affirmed upon error in the exchequer chamber (*c*). The caſe of *Prugnel v. Groſſe* (*d*), is a remarkable caſe; and the ſtreſs was laid upon the conſideration; not whether it was by bond, covenant, or promiſe. The caſe of *Thompſon v. Hervey* (*e*), though but an imperfect report, was of a reſtraint from buying of a particular perſon, and the ſame difference taken (*f*).

* [133] * I ſhall now make a few uſeful obſervations.

FIRST, That a reſtraint to obtain the ſole uſe of trade "through "all *England*" is void; for it is a monopoly.

SECONDLY, That a reſtraint from uſing one's trade in a particular place, if done fairly, and upon a good and lawful conſideration, and with no ill intention, is good.

THIRDLY, That this is not in itſelf unlawful or unreaſonable, for then cuſtom could not make it good, all unjuſt and unreaſonable cuſtoms being void.

FOURTHLY, That ſince it is agreed on all hands that an action upon the caſe would have lain, which concludes *ad damnum*, and there can be no *damnum abſque injuriâ*, it follows, that the law reckons the breach of ſuch a contract an unjuſt and injurious action.

FIFTHLY, That it is not unreaſonable to enforce bye-laws with a penalty; ſince no bye-law which is either unjuſt or unreaſonable can ever be good.

(*a*) Rogers v. Parry, 2. Bulſt. 136. The caſe is there not well ſtated, but may be found 11. *Jac.* 1. Roll. 223.

(*b*) Cro. Jac. 596. Jones, 13.

(*c*) Cro. Jac. 596.

(*d*) Allen, 67. Palm. 172. March, 17.

(*e*) 1. Show. 2. S. C. Comb. 121.

(*f*) 2. Saund. 155.

SIXTHLY

SIXTHLY, The reſtraint of it muſt be upon good conſideration, and the breach of it muſt apparently tend to the damage of the other; for elſe the reſtraint is void, though for a particular place.

I ſhall now give my reaſons, why of involuntary and voluntary reſtraints ſome are void, and others good.

FIRST, For involuntary reſtraints. Grants, charters, &c. erecting monopolies, are void for two reaſons: FIRST, Becauſe they are againſt the freedom and birthright of the ſubject: SECONDLY, Becauſe they are contrary to MAGNA CHARTA. But it is otherwiſe where the grant or charter is to enforce a cuſtom; for if the cuſtom be good, the charter enforcing it muſt be ſo too; or where the grant or charter is made for the good regulation and government of trade; for the public good is ever to be preferred to a private loſs.

Next, In giving the reaſons of voluntary reſtraints, I ſhall proceed, FIRST, *negatively*, and ſhew what are not the * true reaſons; * [134] and SECONDLY, *poſitively*, and point out the true ones.

FIRST, That they are againſt MAGNA CHARTA is no good reaſon; becauſe MAGNA CHARTA provides againſt force and power, not voluntary acts of men.

SECONDLY, That they are againſt the liberty of the ſubject is no good reaſon; for what a man parts with is no longer his own. If I ſell my liberty to trade, it is no longer mine, but his to whom I ſell it.

THIRDLY, It is not a good reaſon, that the condition is againſt law in a proper ſenſe; for every thing that is againſt law in a proper ſenſe muſt be either: FIRST, *malum* (*a*); or, SECONDLY, omitting or neglecting what is a man's duty (*b*); or, LASTLY, encouraging the commiſſion of an evil action (*c*).

I ſay, conditions againſt law in a proper ſenſe muſt fall under one of theſe heads. And this laſt head explains the reaſon of the difference taken 1. *Inſt.* 206. 8. between a feoffment and a bond; that a feoffment to a man upon condition he will kill *B.* ſhall be good, but a bond with ſuch a condition ſhall be void. For in the one caſe, leſt the man ſhould have any temptation to do the act, the law ſecures to him the poſſeſſion of the land without performing the condition; and in the other, frees him from the penalty of the bond; ſo that the law has the ſame end in view in making the feoffment good and the bond void, *viz.* the prevention of the fact. Wherever there can be a way found out to perform the condition without breach of the law, the bond ſhall be eſteemed good (*d*). All things that may be prohibited by law, may be ſo too by the condition of a bond (*e*). * The condition of the bond * [135]

(*a*) Co. Lit. 206. 216. Perkins, 139. Carter, 229. 2. Keb. 140. 153.
(*b*) Palm. 172. Fitz. 13.
(*c*) Brook. Abr. "Condition," 34. Year-Book 2 *Hen.* 4. 9. Hob. 12.
(*d*) Perk. 778. 1. Co. 22. Hob. 12. Norton *v.* Sims, Cro. Eliz. 705.
(*e*) Year-Book 13. *Hen.* 7. 23, 24.

before

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before us is neither *malum in ſe* nor *malum prohibitum*; for then neither cuſtom nor covenant could make it good.

I come now to ſhew *affirmatively*, what are the true reaſons why of contracts in reſtraint of trade ſome are void and others good.

FIRST, Becauſe it is depriving the party of a means of a livelihood.

SECONDLY, Becauſe of the great abuſe ſuch bonds are liable to; as the enabling corporations to exclude foreigners, which they have no right to do; and maſters to lay hardſhips upon their ſervants, apprentices, &c.

THIRDLY, Becauſe it is a condition of no uſe to the other party. *Puffendorf* (*a*) makes all uſeleſs agreements, as an agreement not to waſh one's hands, &c. void. *Cui bono* is ever of great weight in all agreements (*b*).

FOURTHLY, There may be ſeveral caſes where agreements for reſtraint of trade in particular places may be of advantage to ſome, and no diſadvantage to the reſt; and there they are good: as for example, where a town is overſtocked with perſons of the ſame trade; or in the caſe before cited of *Joliffe v. Brode*, where a man grown old and unable to carry on his trade without blunders, and having a good accuſtomed ſhop, *quid damni* in ſuch an agreement, as was there entered into, to either? but an apparent advantage to both.

FIFTHLY, Thoſe contracts in reſtraint of trade are void, where the performance is attended with an immediate and apparent damage to the one ſide, only to free the other from the fear of a diſtant damage, that may or may not happen (*c*). In the caſe of *Barrow v. Wood* (*d*) it is ſaid, that an agreement not to ſow one's land is void; but the caſe in *the Year-Book* (*e*), upon which this aſſertion is founded, warrants no ſuch general poſition (*f*).

*[136] *SIXTHLY, Suppoſing it did not appear in the condition of the bond whether it were upon a fair and juſt conſideration or not, are theſe bonds *primâ facie* to be eſteemed void? or, Shall they be eſteemed good until the party for whoſe advantage it is ſhew in evidence the illegality of the conſideration upon which they are founded? I anſwer, FIRST, as to equity, the law might be ſettled either way, provided it were known. But, SECONDLY, as the law now ſtands they are *primâ facie* void; and for theſe reaſons: Firſt, On account of the benignity of the common law, and the tender regard it has for the liberty and right of the ſubject: Secondly, For the apparent miſchief to one ſide, and no viſible advantage of the other ſide to counterbalance it; which miſchief, in the firſt place, is not barely a private one, but has an influence upon the

(*a*) Puff. de Jure Naturæ, lib. 5. cap. 2. ſ. 3.
(*b*) Year-Book 21. *Hen.* 7 fol. 20.
(*c*) Caſe of Taylors of Ipſwich.
(*d*) March, 192.
(*e*) Mich. 7. *Edw.* 3. 64.
(*f*) Allen, 67.

public,

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public, that being intereſted in a man's trade. And in the ſecond place, there is not only a viſible prejudice of the one ſide, and no apparent advantage of the other, but a great probability that there is none; ſince to its being an advantage to a man to leave his trade, ſo many ſpecial circumſtances are neceſſary as are never to be preſumed where they do not appear. *Hinc conſtat*,

FIRST, That all bonds for reſtraint of trade, and no reaſon given, are *primâ facie* void.

SECONDLY, Where the condition of the bond aſſigns a juſt and fair reaſon, the bond is good, until that reaſon can be falſified.

THIRDLY, From hence it appears, why a bond for reſtraint of trade "all over *England*," be the conſideration what it will, is void; becauſe, without doubt, ſome place or other may be found where the party entering into ſuch a bond may uſe his trade, without any prejudice to the obligee, unleſs the obligee intend by this bond to make a monopoly of the trade; which reaſon is better let alone than given.

FOURTHLY, By this, the difference taken in ſome of our old Books between bond and covenant or promiſe may be very well accounted for, *viz.* Becauſe upon a bond * there is no neceſſity for the reaſon and nature of the contract to appear; whereas in promiſe or covenant the whole nature and all the circumſtances of the contract muſt appear to the jury, before they can determine the damages they are to give for the breach of the covenant. * [137]

FIFTHLY, This not only accounts for the judgments given, but alſo the expreſſions uſed in thoſe caſes; as in the Year-Book of *Henry the Fifth* (*a*), the conſideration of the bond not appearing, and therefore being to be preſumed an oppreſſive bond, the indignation of the Judge, though not the way of expreſſing it (ſwearing), may be excuſed. Perhaps it was ſuch a caſe as this: A weaver forced by the neceſſity of his circumſtances to ſell to his loſs, another takes him, thus chagrined, to the tavern, where, for a trifle, he extorts ſuch a bond from him, and when the cries and tears of his half-ſtarved wife and children call him again to the loom, this bond is put in ſuit againſt him. This were a crime I am at a loſs to find a name for. If, according to *Puffendorf*, by the laws of nature, uſeleſs contracts are void, how much more oppreſſive ones?

And now I come to conſider the caſe of *Clerk v. Taylors of Exeter* (*b*), wherein it is ſaid, that ſuch a contract by *hand* is void, by promiſe good.

And here, FIRST, Upon the face of it this appears very harſh doctrine. For a bond may be conſidered in a twofold reſpect: Firſt, As a ſecurity for not breaking this contract; and can a man be bound too faſt not to break his word? Secondly, The

(*a*) 2. Hen. 5. pl. .

(*b*) 3. Lev. 241.

penalty

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penalty may be conſidered as a compenſation for the breach of the agreement, as a price of re-purchaſing the liberty reſtrained by the bond; and this ſettled by perſons of full age, that are both moſt capable of it, and have likewiſe the beſt right to do it. As a man may *cedere ſuo jure*, ſo he may do it upon what terms he thinks fit. A man may ſay, "I will not abſolutely exclude myſelf
* [138] from doing ſuch a thing; but I will * bind myſelf in a bond of ſuch a penalty not to do it, that ſo, if I think fit to forfeit the penalty, I may be at my liberty *(a)*." And certainly it would be very ſtrange, that the law of *England*, that delights ſo much in certainty, ſhould make a bond void, only becauſe the damages are there aſcertained by the parties themſelves, who are the propereſt perſons to do it, and make a covenant or promiſe good, only becauſe the damages muſt there be reduced to certainty by a jury.

SECONDLY, As this is very harſh doctrine, ſo it was an opinion not at all neceſſary for the judgment given in that caſe, which ſtands unimpeached upon the ground I have all along gone upon in this caſe; ſo that it is only the reporter's opinion, founded upon *March*, 77. 191. a very indifferent reporter. And the reaſon given for the difference, *viz.* that in a bond the whole penalty is forfeited, whereas in a contract it was to be recovered in damages to be aſſeſſed by a jury, was a reaſon that held as well againſt all bonds in general as this. There can be but two reaſons for leaving it to a jury: either that the jury may ſee whether it is a lawful contract or not; which is proper for the conſideration of the Court, not the jury: or elſe, *quia neſcitur quod damnum*; but this is no reaſon here, becauſe the *damnum* is fixed by the conſent of the parties. Let it be further conſidered, that the party can ſuffer nothing but by being a knave; and ſhall a court of juſtice aſſiſt a man to play the knave? Freedom to trade is as much bound by conſent as cuſtom: and the caſe of penalties made for the enforcement of ſuch a cuſtom ſeems to me a ſtronger caſe; for there the party is, as it were, judge in his own caſe, whereas here the penalty is fixed by conſent of both ſides. Such an agreement in taking an apprentice is good, and may be conſidered not as a prejudicial or reſtraining agreement, but as a favourable and advantageous one, as putting an apprentice in a capacity of getting his living in any part of *England*, but where it would be
* [139] to * the prejudice of his maſter, when without it he can gain it no where.

This caſe has been compared to that of an infant, whom a contract for neceſſaries will bind, but not a bond. But this is nothing to the purpoſe; for it ſtands clearly upon the incapacity of the infant to make any contract at all but ſuch as ſhall be for his advantage; and it can never be for his advantage to enter into a penalty. That this is ſo is plain from hence, that if an infant and a ſurety enter into a bond for neceſſaries for the infant, the bond is good as to the ſurety, though not the infant: ſo that it is not the

(*a*) See Bracton, bk. 3. cap. 2.

nature

nature of the bond, but incapacity of the infant, that makes the bond void.

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This caſe has alſo been compared to bonds taken by ſheriffs for their fees, which are void. But here, FIRST, The ſheriff by the common law was to take no fees at all for doing his office; and therefore as theſe fees are given by act of parliament, the act muſt be ſtrictly purſued. But SECONDLY, and principally, Thoſe bonds are void, from the apparent probability that they will make uſe of them to ſupport their oppreſſion. There is but one objection that ſeems to have any colour in it, *viz.* that falſe recitals of conſiderations will make thoſe bonds good that ought to be void. But firſt, This is to be feared no more than falſe teſtimony: ſecondly, This ſpecial matter may be given in evidence.

To conclude: The bond in the caſe before us is good, and entered into upon a juſt and fair conſideration; for the reſtraint is exactly proportioned to the conſideration, *viz.* the term of ſeven years only; and the intereſt of the public is not at all concerned (*a*).

(*a*) See Davis *v.* Maſon, 5. Term Rep. 118.

* Skinner *againſt* Newton.

Caſe 71.

TRESPASS IN AN INFERIOR COURT. The plaintiff declared, that the defendant *vi et armis tres pecias terræ fregit, &c. ipſius* the plaintiff, containing ſo many acres, in ſuch a place. The defendant juſtified by preſcription for a way; and on iſſue joined verdict was given for the plaintiff, and judgment accordingly.

Judgment in treſpaſs reverſed *niſi.* for want of uſing the word "*clauſum*" inſtead of "*pecias.*" S. C. poſt. 168.

UPON ERROR BROUGHT *it was inſiſted*, that the declaration ſhould have been worded *clauſum terræ* inſtead of *pecias.* For treſpaſs is a formed action, and there is no ſort of treſpaſs for which a form is not ſet down; and in thoſe actions for which a form of words is provided by the law, it is not in the power of the plaintiff to uſe what words his fancy ſhall lead him to; but he muſt uſe the words which the law has ſo appropriated that they can be expreſſed by nothing elſe. Every man's ground is in the eye of the law fenced. Treſpaſs will lie for *the veſture* of land; but even there the declaration muſt be not *veſturam terræ*, but *clauſum terræ* (*a*). In treſpaſs for breaking into a church-yard, it was held, that it muſt be *clauſum terræ* (*b*). Where a man has only herbage of land, he muſt declare *quare clauſum fregit* (*c*). In *Web's Caſe* (*d*), the difference is taken between thoſe actions that are formed, *viz.* have ſet forms of words preſcribed for them, and thoſe that have not. Indeed, in *Hobart*, 51 a variance from *the Regiſter*, in a *formedon*, where the variance was not material, was not regarded. In *Hobart*, 84. there is an

(*a*) Co. Lit. 4. b.
(*b*) Year-Book 8. *Hen.* 6. pl 9.
(*c*) Dyer, 285.
(*d*) 8. Co. 48.

inſtance

SKINNER *againſt* NEWTON.

inſtance of a material variance from *the Regiſter*, and held good; but then there was this particular reaſon, that all the courſe of precedents were on the ſide of the variation, which muſt all otherwiſe have been overthrown. In the caſe of *Blake v. Clattel (a)*; * [141] the declaration was, *quare clauſum * fregit, et diverſa onera* of gravel, &c. *per quod viam ſuam amiſit*; and the judgment was arreſted. The word "*clauſum*" imports poſſeſſion, without which treſpaſs is not maintainable *(b)*; for tenant at will or for years, reverſion to another, he in reverſion cannot maintain an action of treſpaſs during the life of tenant for years: but *pecia terræ* does not import poſſeſſion; for *terra revertens* is *terra* ſtill.

IT WAS ARGUED *on the other ſide*, that though "*clauſum*" was the word in *the Regiſter*, yet it was but matter of form, and therefore pleadable indeed in abatement, but not aſſignable for error, after a verdict and judgment. In the caſe of *Palmer v. Humfrey (c)*, the words *pecias terræ* were held good in an ejectment. It is true, that judgment was reverſed; but the reaſon was, becauſe there was not certainty enough to direct the ſheriff what land to deliver to the party for whom the judgment ſhould paſs; whereas here was as much certainty as could be deſired; for it was not *tres pecias terræ* barely, but the declaration goes on and ſays, *ipſius* the plaintiff (which proves him to have been in poſſeſſion, and ſo obviates that objection), containing ſo many acres in ſuch a place.

PARKER, *Chief Juſtice*, and POWELL, *Juſtice*. There is no want of certainty in this declaration; and after a verdict and judgment, it is hard for meer form to reverſe, &c. Indeed, in real actions, that are formed actions, men are tied up ſtrictly to the form preſcribed in THE REGISTER: *Sed aliter* in perſonal actions.

EYRE, *Juſtice*, was of the ſame opinion, and gave this additional reaſon, that error does not remove the writ nor plaint, but the proceedings only; and the plaintiff in error could not be let in to make this objection but from the one or the other. But ſuppoſing the plaint was removed, it could not appear in the plaint; for * [142] that is * only *in placito tranſgreſſionis ſuper caſum*, without going further.

POWELL, *Juſtice*, thought this reaſon of no weight, becauſe he was of opinion, that a writ of error in a judgment given in a ſuperior court does not indeed remove the record or plaint, but proceedings only; becauſe here *diminution* may be alledged: but he was of opinion, that writs of error of judgments in an inferior court removed all, becauſe there was no alledging of diminution.

Adjournatur (d).

(a) 2. Vent. 73.

(b) Year-Book 22. *Edw.* 4. 12. a.

(c) Moor, 422.

(d) It is ſaid to have been held in this caſe, that the variance from the Regiſter might have been taken advantage of in abatement, but that the defendant having waived that opportunity could not take advantage of it on a writ of error, 1. Stra. 157.—But ſee S. C. poſt. 168. where it is ſaid, that the judgment was reverſed.

Hacket

Hacket *againſt* Glover.

Caſe 72.

WRIT OF ERROR, out of the court of common pleas, upon an action of covenant, wherein the plaintiff declares, that the defendant ſold him goods for ſo much money, and covenanted to defend and warrant the goods to the plaintiff *contra omnes perſonas*; and aſſigns for breach of the covenant, that at the time of the ſale the defendant had neither *the poſſeſſion* nor *the property* of the goods. To this the defendant demurred, and judgment was given for the plaintiff.

If a perſon ſell goods, and warrant them to the vendee *againſt all perſons*, it may be aſſigned as a breach of the covenant, that the vendor, at the time of the ſale, had neither the *poſſeſſion* nor the *property* of them.

A writ of error was brought.

SIR PETER KING inſiſted, that this was no breach of the covenant; for the intention and deſign of the covenant was only to ſecure the poſſeſſion; and therefore until an eviction the covenant was not broken. *Lord Coke* (*a*) ſays, that an eviction is of the very eſſence of a warranty; and though *warrantia chartæ* may be brought before eviction, it is only a charge upon the land (*b*). Suppoſe a man having only an equitable intereſt in goods ſell thoſe goods, and covenant that he is the owner of thoſe goods, and will warrant and defend, &c. ſhall the vendee, in this caſe, bring an action of covenant before eviction, and ſupport it only by * ſaying, that the property, *viz.* the legal title, was in another at the time of the ſale (*c*).

* [143]

MR. LUTWYCHE, *on the other ſide*, argued, that ſince it was confeſſed by the demurrer that he who ſold them had neither the poſſeſſion nor the property, the buyer could not take poſſeſſion of them without expoſing himſelf to an action of trover. The word "*dimiſi*" in a leaſe imports a covenant in law; and in ſuch an action it had been enough to aſſign for breach, that the leſſor had no title at the time of the leaſe, without ſhewing an eviction (*d*).

PARKER, *Chief Juſtice*. The plaintiff cannot uſe the goods without being liable to an action, which is a damage. If the caſe had been, that the defendant had had the equitable right, but another the legal one, it had been proper for you to have laid it before the Court by pleading it.

EYRE, *Juſtice*. A warranty, in the nature of it, imports as well warranty of the property as poſſeſſion (*e*). The caſe upon the word "*dimiſi*" is a ſtrong caſe; for that is a covenant in law; and if not neceſſary there to ſet forth eviction, *à fortiori* not here.

Judgment was affirmed (*f*).

(*a*) Co Lit. 365. a.

(*b*) Fitz. N. B. 134.

(*c*) The caſes in Moor, 175. Hob. 34. 51. Dyer, 328. 1. Roll. Rep. 519. and 2. Saund. 175. were quoted; but moſt of them only prove, that a covenant for enjoyment againſt all interruption extends only to legal interruptions. *Quod conceſſum per Curiam ſed nihil ad rem.* —NOTE *to the former edition.*

(*d*) 4. Co. 80. Cro. Jac. 474. 3. Mod. 261. 1. Sid. 178.

(*e*) See Warren *v.* Tallard, 1. Roll. 90.

(*f*) See Severn *v.* Clarke, 1. Leon. 122. Northcote *v.* Underhill, Salk. 199.

Sheppherd

Caſe 73.

* Sheppherd *againſt* Maidſtone.

On a covenant that *A.* ſhall ſerve *B.* as a factor, and faithfully account for the goods he ſhould receive, or the net produce of them; a breach that he received ſo many rupees, and fraudulently converted them to his own uſe, is not well aſſigned.

1. Roll. Abr. 224.
1. Bac. Abr. 8vo. 39.
1. Stra. 227.
2. Burr. 773.

DEBT UPON BOND. Upon *oyer* of the bond it appeared, that the condition was, FIRST, that the defendant ſhould perform all covenants compriſed in ſuch a deed of indenture. SECONDLY, That he would, upon requeſt, come to an account with the *Eaſt-India Company* for whatever of their goods ſhould come to his hands, or the net produce of them. THIRDLY, That he would pay them whatever, upon ſuch an account taken, he ſhould be found in arrear to them.

In the deed of indenture referred to it was covenanted, that the defendant ſhould, within ſuch a time, go for *Fort St. George*, and ſerve the Company faithfully there, as *a factor*, for five years.

The breach aſſigned was, that ſo many *rupees* belonging to *the Company* came to his hands, which *illicitè et fraudulenter imbezilavit, et in proprium uſum, &c. contra tenorem indenturæ, &c.*

THE QUESTION upon *demurrer* was, Whether the breach aſſigned was a breach of the condition of the bond?

IT WAS RESOLVED BY THE COURT, that it was not; for the defendant was not barely entruſted with the cuſtody of the Company's goods, but was their *factor*; and, as ſuch, had a power to inveſt their money and goods in whatever he thought moſt for the advantage of the Company, and was not to account for the goods themſelves, but for the net produce of them: ſo that he might convert to his own uſe the ſtock that was the Company's, provided he anſwered it to them out of his own. Indeed, in caſe of *an apprentice* the caſe is different (*a*); for he has only the
* [145] cuſtody of his maſter's goods and * caſh, and therefore the breach here aſſigned would have been a forfeiture of his indentures.

PENGELLY, *Serjeant*, being retained to ſpeak to it,

Adjournatur (*b*).

(*a*) See Thornycroft *v.* Barnes, poſt. 150.

(*b*) See the caſe of the African Company *v.* Maſon, poſt. 227. Gilb. Rep. 238.

Caſe 74.

Parker *againſt* Langly.

A declaration in an action on the caſe for a malicious proſecution muſt ſhew what became of the malicious proſecution.

S. C. poſt. 209.

THIS was an action upon the caſe for a *malicious proſecution* wherein the plaintiff declared, that the defendant arreſted him in the ſum of one hundred pounds, on purpoſe to hold him to ſpecial bail, where not one penny was due.

The defendant demurred ſpecially, and ſhewed for cauſe of demurrer, that the plaintiff had not, in his declaration, ſhewn what became of this malicious proſecution.

S. C. Gilb. 163.

THEY THAT ARGUED *for the defendant* owned, that after a verdict judgment could not have been arreſted for this defect in the

the declaration, becauſe it could not be intended that the plaintiff could have had a verdict, unleſs it had appeared that the proſecution was malicious (*a*); but upon demurrer, and that a ſpecial one, it was inſiſted upon as a good exception; for no action will lie for a malicious indictment, without ſhewing what became of the indictment (*b*). PARKER *againſt* LANGLY.

* IT WAS ARGUED *for the plaintiff*, that this action is founded upon malice, and brought for holding to exceſſive bail, which was collateral to the proſecution, and therefore not to wait the event of that, of which, if they did, the ſtatute of Limitations might poſſibly bar them (*c*). * [146]

It was urged, that there is a difference between an action upon the caſe for a malicious proſecution and an action of conſpiracy; that in the latter, the plaintiff muſt indeed ſhew the former action to be determined; but then it appears from *the Regiſter* (*d*), that this does not proceed from the nature of the action, but the frame of the writ; and this held to be the reaſon (*e*).

THE COURT inclined in favour of defendant,

Sed adjournatur (*f*).

(*a*) Skinner v. Gunter, Saund. 228.

(*b*) Caſes quoted *arguendo* were, 2. *Rich.* 3. 9. b. Salk. 15. Hobart, 205. Keilway, 99. b. Godbolt, 76. 1. Saunders, 228, 229. 1. Jones, 312. Siderfin, 124. Yelverton, 117. Cro. Car. 491. The reaſon of all which caſes is founded in this, that otherwiſe there might be a claſhing of juriſdictions, and contrary verdicts; as here it is poſſible, that the defendant may be found guilty of a malicious proſecution; and it may afterwards be adjudged, in a proper place, that the proſecution was not malicious.—NOTE *to former edition.*

(*c*) Stiles, 451. 3. Lev. 210.

(*d*) Reg. 134.

(*e*) 1. Vent. 32. 1. Jones, 93. Poulter's Caſe, 9. Co. Cro. Jac. 130.

(*f*) See poſt. page 210. where PARKER, *Chief Juſtice*, delivered the opinion of the Court in favour of the defendant.

The Queen *againſt* The Corporation of Durham. Caſe 75.

THIS was a *mandamus* to reſtore *H.* to the office of town-clerk. On a *mandamus* to reſtore a town-clerk, a return that he was *attainted* is not bad.

Two exceptions were taken to the return:

FIRST, That they ſaid, that ſuch a year of *Queen Elizabeth*, and long before, they were a corporation; and ſo did not intitle themſelves by preſcription, which is ever time out of mind (*a*).

THE COURT were of opinion, that a corporation muſt either be by charter or preſcription, which is ever time out of mind; and therefore the authorities were allowed for law: but yet the exception was diſallowed, becauſe it was only failing in a matter of ſurpluſage. 1. Sid. 33.

SECONDLY, It was excepted, that it was not returned, that the town-clerk was actually choſen annually, but only that he was *an-*

(*a*) See the caſe of Sutton Hoſpital, 10. Co. 1. Cro. Eliz. 168. The Year-Book 12. *Edw.* 4. fo. 8. Bagg's Caſe, 11. Co. 93. Raſt. Ent. 3. and Dyer, 7.

THE QUEEN *againſt* THE CORPORATION OF DURHAM.

nuatim eligibilis; whereas time and uſage are neceſſary to preſcription (*a*). * Beſides, the office of town-clerk is, in the nature of it, in the eye of the law, an office for life; and will be ſo intended, until the contrary appear (*b*).

The office of town-clerk is *prima facie* an office for life.

THE COURT were of opinion, that the other exception is good; for the office of town-clerk is an office for life, unleſs reſtrained by charter or preſcription, which ought to be ſhewn upon the return; and that this was not done. Beſides, though he be *annuatim eligibilis*, he may continue town-clerk, and will do ſo, until they chooſe another; but this does not appear to be done; and therefore the exception is good for both theſe reaſons. If the return had been, "*eligibilis pro uno anno tantùm*," his office would have expired at the end of the year, whether they had choſen another or not; but it is otherwiſe as this return is.

(*a*) See Co. Lit. 110. 1. Lev. 262. 3. Cro. 110. (*b*) 1. Vent. 82.

Caſe 76. Merril *againſt* Joſſelyn.

In debt on bond payable 25th *March*, if the defendant plead *ſolvit ante diem*, and the plaintiff *take iſſue* inſtead of demurring, the plaintiff cannot have judgment.

WRIT OF ERROR out of the court of common pleas. The action was debt upon a bond conditioned for payment of money upon the twenty-fifth of *March*. The defendant pleaded payment upon the twentieth of *March*. The plaintiff replied, that he did not pay it upon the twentieth of *March*. Upon this iſſue was joined; a verdict given for the plaintiff; judgment entered accordingly; and a writ of error brought.

If the verdict had been found for the defendant, and judgment given accordingly, all had been right; for * payment upon the twentieth is payment upon the twenty-firſt, and ſo on; but now the verdict is found for the plaintiff, the iſſue is immaterial; for non-payment upon the twentieth can be no evidence of non-payment upon the twenty-fifth; for it might be paid in the mean time (*a*).

* [148]

S. C. cited 8. Mod. 346.

PARKER, *Chief Juſtice*. It is hard that the defendant ſhould take advantage of his own immaterial pleading; but we cannot help it. The caſe of *Hill v. Manby* (*b*), in the court of common pleas, is a caſe in point.

The judgment was reverſed (*c*).

(*a*) See Cro. Jac. 434. Cro. Eliz. 828. and the caſe of Maſon *v.* Price, Hilary Term, 9. *Anne*.

(*b*)

(*c*) See the ſtatute 4. & 5. *Anne*, c. 16. ſ. 12. Bull. N. P. 174. 2. Stra. 994. 2. Burr. 944. 1. Bl. Rep. 210.

Caſe 77. Jones *againſt* Gwynn.

In an action for a malicious proſecution, it muſt appear to have been *malicious* and *without probable* cauſe.

THIS was an action upon the caſe for falſely and maliciouſly indicting a man for uſing the trade of *a badger*, without a licence to do it.

S. C. poſt. 214.—S. C. 1. Salk. 15. S. C. Gilb. 185. Stra. 977. Bull. N. P. 14. 4. Burr. 1974. 1. Term Rep. 544.

One

One exception to the declaration was, that the indictment was ſaid to be *falsò et malitiosè*, and not *abſque probabili cauſâ*. JONES *againſt* GWYNN.

BUT IT WAS RESOLVED, that in the caſe of an indictment, "*falsò* "*et malitiosè*," without "*abſque probabili cauſâ*," is enough: but had it been an action for a malicious proſecution, thoſe words muſt have been in (*a*).

BUT ANOTHER EXCEPTION was taken by THE COURT, that this was an action brought on an indictment for uſing, &c. and not being licenſed, and yet the plaintiff does not ſhew that he was licenſed. *[149]

THEN IT WAS DOUBTED, Whether this were a matter indictable? and then the queſtion would be, Whether * an action would lie for falſely and maliciouſly indicting a man for a matter not indictable, nor yet containing ſcandal? An action for a malicious proſecution will lie, although the indictment is bad; for it equally ſerves the purpoſe of malice as if it had been good.

THE COURT inclined to the opinion, that it would not, and that the law ſtood thus, *viz.* that a falſe and malicious indictment, for a matter not indictable, yet containing ſcandal, is actionable; but that if it be neither indictable nor ſcandalous, it is not actionable (*b*); and that if it were for a matter indictable, though it did not import ſcandal, it is actionable.

To this opinion of the Court it was objected by the Counſel, that in the reaſon of the thing they could not ſee, why its being for a matter indictable or not indictable, ſhould occaſion ſuch a difference, ſince a perſon, by being falſely and maliciouſly indicted for a matter not indictable, is put to the ſame expence and trouble as if it were for a matter indictable; and the maliciouſneſs of the proſecution is rather more.

THE COURT allowed this way of reaſoning to have weight in it (*c*).

(*a*) Cro. Jac. 193. 490. 2. Mod. 51. Jones, 93.—But ſee Farrel *v.* Nunn, Bull. N. P. 14. Fiſher *v.* Briſtow, Dougl. 205. Lewis *v.* Farrel, 1. Stra. 114. Morgan *v.* Hughes, 2. Term Rep. 225.

(*b*) Raym. 35. 3 Sid. 162. and the caſe of Savil *v.* Robarts, Salk. 13.

(*c*) The Court took time to conſider of this caſe; and in Hilary Term, in the twelfth year of *Queen Anne*, PARKER, *Chief Juſtice*, delivered the opinion of the Judges, and gave judgment for the plaintiff. See S. C. poſt 214.—See alſo the caſes of Chambers *v.* Robinſon, 1. Stra. 691. Payne *v.* Porter, Cro. Jac. 490. Wicks *v.* Fentham, 4. Term Rep. 248.

Thornicroft *againſt* Barns. Caſe 78.

WRIT OF ERROR brought upon a judgment given in the court of common pleas. The action was debt upon a bond of one thouſand pounds penalty, conditioned, that if ſuch a one, being an *apprentice*, ſhould purloin or embezzle any thing to his maſter's damage, that then he ſhould make it good, In debt on bond, conditioned, that if the *apprentice* of the *obligee* ſhould *purloin or embezzle* anything to his maſter's damage, the *obligor* will pay it; a breach that he *embezzled and purloined* 200l. is well aſſigned.

THORNICROFT *against* BARNS.

The breach assigned was, that he did embezzle and purloin two hundred pounds.

Upon this issue was joined; a verdict given for the plaintiff; and judgment accordingly.

* [150] * Now, upon error brought, IT WAS INSISTED, that the breach was not well assigned; for the condition of the bond tying it up to such purloining as should be to the damage of the master, the plaintiff in the original action should have averred, that this was a purloining to the damage of the master.

But THE WHOLE COURT thought the judgment of the court of common pleas was well given; for the words "purloining" and "embezzling" are always taken in a bad sense, and *ex vi termini* import damage to the master; and what appears plainly needs not be averred, according to that maxim of law, *Quod constat clarè non debet verificari.*

The judgment was affirmed *nisi* (*a*).

(*a*) See Bache *v.* Proctor, Dougl. 382. Jones *v.* Williams, Dougl. 213.

Case 79.

The Queen *against* The Inhabitants of Hornsey.

Public way.

PARKER, *Chief Justice.* If a vill be erected, and a way laid out to it, if there be no other way but that to the vill, it is not material *quo animo* it was laid out, it shall be deemed *a public way.*

Evidence.

SECONDLY, No one living in a hundred shall be allowed to give evidence for any matter in favour of that hundred, though so poor as upon that account to be excused from the payment of taxes, because though poor at present he may become rich.

EASTER TERM,

The Twelfth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir Thomas Powys, *Knt.*
} *Juſtices.*

Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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* The Caſe of the Corporation of Bewdley. Caſe 80.

THOSE that produce a witneſs ought to examine him *in chief* only: but they, againſt whom he is brought, may examine him upon a *voir dire*, if they pleaſe, whether he is concerned in intereſt.

A witneſs can only be examined on *voir dire* by the oppoſite ſide.

Salk. 594. 11. Mod. 100. 115.

The matter in iſſue was, Which was the charter by which the corporation of the town of *Bewdley* was to act; whether by the ancient one, or one of later date?

A witneſs may be examined to explain his anſwer in chancery, touching his intereſt in the cauſe.

A witneſs was produced to eſtabliſh the ancient charter.

His evidence was excepted againſt, as being a mortgagee under the old corporation.

This was proved by an anſwer of his to a bill in chancery.

But it was inſiſted that this anſwer was ſo uncertainly penned, as that it might be true, and yet his mortgage of ſuch a nature as not to prevent his evidence, and therefore that he might be called to explain the ambiguity of his anſwer.

MITCHELL *againſt* REYNOLDS.

penalty may be conſidered as a compenſation for the breach of the agreement, as a price of re-purchaſing the liberty reſtrained by the bond; and this ſettled by perſons of full age, that are both moſt capable of it, and have likewiſe the beſt right to do it. As a man may *cedere ſuo jure*, ſo he may do it upon what terms he thinks fit. A man may ſay, "I will not abſolutely exclude myſelf from doing ſuch a thing; but I will * bind myſelf in a bond of ſuch a penalty not to do it, that ſo, if I think fit to forfeit the penalty, I may be at my liberty *(a)*." And certainly it would be very ſtrange, that the law of *England*, that delights ſo much in certainty, ſhould make a bond void, only becauſe the damages are there aſcertained by the parties themſelves, who are the propereſt perſons to do it, and make a covenant or promiſe good, only becauſe the damages muſt there be reduced to certainty by a jury.

* [138]

SECONDLY, As this is very harſh doctrine, ſo it was an opinion not at all neceſſary for the judgment given in that caſe, which ſtands unimpeached upon the ground I have all along gone upon in this caſe; ſo that it is only the reporter's opinion, founded upon *March*, 77. 191. a very indifferent reporter. And the reaſon given for the difference, *viz.* that in a bond the whole penalty is forfeited, whereas in a contract it was to be recovered in damages to be aſſeſſed by a jury, was a reaſon that held as well againſt all bonds in general as this. There can be but two reaſons for leaving it to a jury: either that the jury may ſee whether it is a lawful contract or not; which is proper for the conſideration of the Court, not the jury: or elſe, *quia neſcitur quod damnum*; but this is no reaſon here, becauſe the *damnum* is fixed by the conſent of the parties. Let it be further conſidered, that the party can ſuffer nothing but by being a knave; and ſhall a court of juſtice aſſiſt a man to play the knave? Freedom to trade is as much bound by conſent as cuſtom: and the caſe of penalties made for the enforcement of ſuch a cuſtom ſeems to me a ſtronger caſe; for there the party is, as it were, judge in his own caſe, whereas here the penalty is fixed by conſent of both ſides. Such an agreement in taking an apprentice is good, and may be conſidered not as a prejudicial or reſtraining agreement, but as a favourable and advantageous one, as putting an apprentice in a capacity of getting his living in any part of *England*, but where it would be to * the prejudice of his maſter, when without it he can gain it no where.

* [139]

This caſe has been compared to that of an infant, whom a contract for neceſſaries will bind, but not a bond. But this is nothing to the purpoſe; for it ſtands clearly upon the incapacity of the infant to make any contract at all but ſuch as ſhall be for his advantage; and it can never be for his advantage to enter into a penalty. That this is ſo is plain from hence, that if an infant and a ſurety enter into a bond for neceſſaries for the infant, the bond is good as to the ſurety, though not the infant: ſo that it is not the

(*a*) See Bracton, bk. 3. cap. 2.

nature

nature of the bond, but incapacity of the infant, that makes the bond void.

MITCHELL *againſt* REYNOLDS.

This caſe has alſo been compared to bonds taken by ſheriffs for their fees, which are void. But here, FIRST, The ſheriff by the common law was to take no fees at all for doing his office; and therefore as theſe fees are given by act of parliament, the act muſt be ſtrictly purſued. But SECONDLY, and principally, Thoſe bonds are void, from the apparent probability that they will make uſe of them to ſupport their oppreſſion. There is but one objection that ſeems to have any colour in it, *viz.* that falſe recitals of conſiderations will make thoſe bonds good that ought to be void. But firſt, This is to be feared no more than falſe teſtimony: ſecondly, This ſpecial matter may be given in evidence.

To conclude: The bond in the caſe before us is good, and entered into upon a juſt and fair conſideration; for the reſtraint is exactly proportioned to the conſideration, *viz.* the term of ſeven years only; and the intereſt of the public is not at all concerned (*a*).

(*a*) See Davis *v.* Maſon, 5. Term Rep. 118.

* Skinner *againſt* Newton.

Caſe 71.

TRESPASS IN AN INFERIOR COURT. The plaintiff declared, that the defendant *vi et armis tres pecias terræ fregit, &c. ipſius* the plaintiff, containing ſo many acres, in ſuch a place. The defendant juſtified by preſcription for a way; and on iſſue joined verdict was given for the plaintiff, and judgment accordingly.

Judgment in treſpaſs reverſed *miſi*, for want of uſing the word "*clau'um*" inſtead of "*pe-cias.*" S. C. poſt. 168.

UPON ERROR BROUGHT *it was inſiſted*, that the declaration ſhould have been worded *clauſum terræ* inſtead of *pecias*. For treſpaſs is a formed action, and there is no ſort of treſpaſs for which a form is not ſet down; and in thoſe actions for which a form of words is provided by the law, it is not in the power of the plaintiff to uſe what words his fancy ſhall lead him to; but he muſt uſe the words which the law has ſo appropriated that they can be expreſſed by nothing elſe. Every man's ground is in the eye of the law fenced. Treſpaſs will lie for *the veſture* of land; but even there the declaration muſt be not *veſturam terræ*, but *clauſum terræ* (*a*). In treſpaſs for breaking into a church-yard, it was held, that it muſt be *clauſum terræ* (*b*). Where a man has only herbage of land, he muſt declare *quare clauſum fregit* (*c*). In *Web's Caſe* (*d*), the difference is taken between thoſe actions that are formed, *viz.* have ſet forms of words preſcribed for them, and thoſe that have not. Indeed, in *Hobart*, 51 a variance from *the Regiſter*, in a *formedon*, where the variance was not material, was not regarded. In *Hobart*, 84. there is an

(*a*) Co. Lit. 4. b.
(*b*) Year-Book 8. *Hen.* 6. pl 9.
(*c*) Dyer, 285.
(*d*) 8. Co. 48.

inſtance

SKINNER *against* NEWTON.

instance of a material variance from *the Regiſter*, and held good; but then there was this particular reaſon, that all the courſe of precedents were on the ſide of the variation, which muſt all otherwiſe have been overthrown. In the caſe of *Blake v. Clattel (a)*; * [141] the declaration was, *quare clauſum * fregit, et diverſa onera* of gravel, &c. *per quod viam ſuam amiſit*; and the judgment was arreſted. The word "*clauſum*" imports poſſeſſion, without which treſpaſs is not maintainable *(b)*; for tenant at will or for years, reverſion to another, he in reverſion cannot maintain an action of treſpaſs during the life of tenant for years: but *pecia terræ* does not import poſſeſſion; for *terra revertens* is *terra* ſtill.

IT WAS ARGUED *on the other ſide*, that though "*clauſum*" was the word in *the Regiſter*, yet it was but matter of form, and therefore pleadable indeed in abatement, but not aſſignable for error, after a verdict and judgment. In the caſe of *Palmer v. Humfrey (c)*, the words *pecias terræ* were held good in an ejectment. It is true, that judgment was reverſed; but the reaſon was, becauſe there was not certainty enough to direct the ſheriff what land to deliver to the party for whom the judgment ſhould paſs; whereas here was as much certainty as could be deſired; for it was not *tres pecias terræ* barely, but the declaration goes on and ſays, *ipſius* the plaintiff (which proves him to have been in poſſeſſion, and ſo obviates that objection), containing ſo many acres in ſuch a place.

PARKER, *Chief Juſtice*, and POWELL, *Juſtice*. There is no want of certainty in this declaration; and after a verdict and judgment, it is hard for meer form to reverſe, &c. Indeed, in real actions, that are formed actions, men are tied up ſtrictly to the form preſcribed in THE REGISTER: *Sed aliter* in perſonal actions.

EYRE, *Juſtice*, was of the ſame opinion, and gave this additional reaſon, that error does not remove the writ nor plaint, but the proceedings only; and the plaintiff in error could not be let in to make this objection but from the one or the other. But ſuppoſing the plaint was removed, it could not appear in the plaint; for * [142] that is * only *in placito tranſgreſſionis ſuper caſum*, without going further.

POWELL, *Juſtice*, thought this reaſon of no weight, becauſe he was of opinion, that a writ of error in a judgment given in a ſuperior court does not indeed remove the record or plaint, but proceedings only; becauſe here *diminution* may be alledged: but he was of opinion, that writs of error of judgments in an inferior court removed all, becauſe there was no alledging of diminution.

Adjournatur (d).

(a) 2. Vent. 73.

(b) Year-Book 22. *Edw.* 4. 12. a.

(c) Moor, 422.

(d) It is ſaid to have been held in this caſe, that the variance from the Regiſter might have been taken advantage of in abatement, but that the defendant having waived that opportunity could not take advantage of it on a writ of error, 1. Stra. 157.—But ſee S. C. poſt. 168. where it is ſaid, that the judgment was reverſed.

Hacket

Hacket *againſt* Glover.

Caſe 72.

If a perſon ſell goods, and warrant them to the vendee *againſt all perſons*, it may be aſſigned as a breach of the covenant, that the vendor, at the time of the ſale, had neither the *poſſeſſion* nor the *property* of them.

WRIT OF ERROR, out of the court of common pleas, upon an action of covenant, wherein the plaintiff declares, that the defendant ſold him goods for ſo much money, and covenanted to defend and warrant the goods to the plaintiff *contra omnes perſonas*; and aſſigns for breach of the covenant, that at the time of the ſale the defendant had neither *the poſſeſſion* nor *the property* of the goods. To this the defendant demurred, and judgment was given for the plaintiff.

A writ of error was brought.

SIR PETER KING inſiſted, that this was no breach of the covenant; for the intention and deſign of the covenant was only to ſecure the poſſeſſion; and therefore until an eviction the covenant was not broken. *Lord Coke* (*a*) ſays, that an eviction is of the very eſſence of a warranty; and though *warrantia chartæ* may be brought before eviction, it is only a charge upon the land (*b*). Suppoſe a man having only an equitable intereſt in goods ſell thoſe goods, and covenant that he is the owner of thoſe goods, and will warrant and defend, &c. ſhall the vendee, in this caſe, bring an action of covenant before eviction, and ſupport it only by * ſaying, that the property, *viz.* the legal title, was in another at the time of the ſale (*c*). * [143]

MR. LUTWYCHE, *on the other ſide*, argued, that ſince it was confeſſed by the demurrer that he who ſold them had neither the poſſeſſion nor the property, the buyer could not take poſſeſſion of them without expoſing himſelf to an action of trover. The word "*dimiſi*" in a leaſe imports a covenant in law; and in ſuch an action it had been enough to aſſign for breach, that the leſſor had no title at the time of the leaſe, without ſhewing an eviction (*d*).

PARKER, *Chief Juſtice*. The plaintiff cannot uſe the goods without being liable to an action, which is a damage. If the caſe had been, that the defendant had had the equitable right, but another the legal one, it had been proper for you to have laid it before the Court by pleading it.

EYRE, *Juſtice*. A warranty, in the nature of it, imports as well warranty of the property as poſſeſſion (*e*). The caſe upon the word "*dimiſi*" is a ſtrong caſe; for that is a covenant in law; and if not neceſſary there to ſet forth eviction, *à fortiori* not here.

Judgment was affirmed (*f*).

(*a*) Co Lit. 365. a.

(*b*) Fitz. N. B. 134.

(*c*) The caſes in Moor, 175. Hob. 34. 51. Dyer, 328. 1. Roll. Rep. 519. and 2. Saund. 175. were quoted; but moſt of them only prove, that a covenant for enjoyment againſt all interruption extends only to legal interruptions. *Quod conceſſum per Curiam ſed nihil ad rem.* —NOTE *to the former edition.*

(*d*) 4. Co. 80. Cro. Jac. 474. 3. Mod. 261. 1. Sid. 178.

(*e*) See Warren *v.* Tallard, 1. Roll. 90.

(*f*) See Severn *v.* Clarke, 1. Leon. 122. Northcote *v.* Underhill, Salk. 199.

Sheppherd

Case 73.

* Sheppherd *againſt* Maidſtone.

On a covenant that *A.* ſhall ſerve *B.* as a factor and faithfully account for the goods he ſhould receive, or the net produce of them; a breach that he received ſo many rupees, and fraudulently converted them to his own uſe, is not well aſſigned.

1. Roll. Abr. 124.
1. Bac. Abr. 8vo. 39.
1. Stra. 227.
2. Burr. 773.

DEBT UPON BOND. Upon *oyer* of the bond it appeared, that the condition was, FIRST, that the defendant ſhould perform all covenants compriſed in ſuch a deed of indenture. SECONDLY, That he would, upon requeſt, come to an account with the *Eaſt-India Company* for whatever of their goods ſhould come to his hands, or the net produce of them. THIRDLY, That he would pay them whatever, upon ſuch an account taken, he ſhould be found in arrear to them.

In the deed of indenture referred to it was covenanted, that the defendant ſhould, within ſuch a time, go for *Fort St. George*, and ſerve the Company faithfully there, as *a factor*, for five years.

The breach aſſigned was, that ſo many *rupees* belonging to *the Company* came to his hands, which *illicitè et fraudulenter imbezilavit, et in proprium uſum, &c. contra tenorem indenturæ, &c.*

THE QUESTION upon *demurrer* was, Whether the breach aſſigned was a breach of the condition of the bond?

IT WAS RESOLVED BY THE COURT, that it was not; for the defendant was not barely entruſted with the cuſtody of the Company's goods, but was their *factor*; and, as ſuch, had a power to inveſt their money and goods in whatever he thought moſt for the advantage of the Company, and was not to account for the goods themſelves, but for the net produce of them: ſo that he might convert to his own uſe the ſtock that was the Company's, provided he anſwered it to them out of his own. Indeed, in caſe of *an apprentice* the caſe is different (*a*); for he has only the
* [145] cuſtody of his maſter's goods and * caſh, and therefore the breach here aſſigned would have been a forfeiture of his indentures.

PENGELLY, *Serjeant*, being retained to ſpeak to it,

Adjournatur (*b*).

(*a*) See Thornycroft *v.* Barnes, poſt. 150.

(*b*) See the caſe of the African Company *v.* Maſon, poſt. 227. Gilb. Rep. 238.

Case 74.

Parker *againſt* Langly.

A declaration in an action on the caſe for a malicious proſecution muſt ſhew what became of the malicious proſecution.
S. C. poſt. 209.

THIS was an action upon the caſe for a *malicious proſecution* wherein the plaintiff declared, that the defendant arreſted him in the ſum of one hundred pounds, on purpoſe to hold him to ſpecial bail, where not one penny was due.

The defendant demurred ſpecially, and ſhewed for cauſe of demurrer, that the plaintiff had not, in his declaration, ſhewn what became of this malicious proſecution.

S. C. Gilb. 163.

THEY THAT ARGUED *for the defendant* owned, that after a verdict judgment could not have been arreſted for this defect in the

the declaration, becauſe it could not be intended that the plaintiff could have had a verdict, unleſs it had appeared that the proſecution was malicious (*a*); but upon demurrer, and that a ſpecial one, it was inſiſted upon as a good exception; for no action will lie for a malicious indictment, without ſhewing what became of the indictment (*b*). PARKER *againſt* LANGLY.

* IT WAS ARGUED *for the plaintiff*, that this action is founded upon malice, and brought for holding to exceſſive bail, which was collateral to the proſecution, and therefore not to wait the event of that, of which, if they did, the ſtatute of Limitations might poſſibly bar them (*c*). * [146]

It was urged, that there is a difference between an action upon the caſe for a malicious proſecution and an action of conſpiracy; that in the latter, the plaintiff muſt indeed ſhew the former action to be determined; but then it appears from *the Regiſter* (*d*), that this does not proceed from the nature of the action, but the frame of the writ; and this held to be the reaſon (*e*).

THE COURT inclined in favour of defendant,

Sed adjournatur (*f*).

(*a*) Skinner *v.* Gunter, Saund. 228.

(*b*) Caſes quoted *arguendo* were, 2. *Rich.* 3. 9. b. Salk. 15. Hobart, 205. Keilway, 99. b. Godbolt, 76. 1. Saunders, 228, 229. 1. Jones, 312. Siderfin, 124. Yelverton, 117. Cro. Car. 491. The reaſon of all which caſes is founded in this, that otherwiſe there might be a claſhing of juriſdictions, and contrary verdicts; as here it is poſſible, that the defendant may be found guilty of a malicious proſecution; and it may afterwards be adjudged, in a proper place, that the proſecution was not malicious.—NOTE *to former edition.*

(*c*) Stiles, 451. 3. Lev. 210.

(*d*) Reg. 134.

(*e*) 1. Vent. 32. 1. Jones, 93. Poulter's Caſe, 9. Co. Cro. Jac. 130.

(*f*) See poſt. page 210. where PARKER, *Chief Juſtice*, delivered the opinion of the Court in favour of the defendant.

The Queen *againſt* The Corporation of Durham. Caſe 75.

THIS was a *mandamus* to reſtore *H.* to the office of town-clerk. Two exceptions were taken to the return:

On a *mandamus* to reſtore a town-clerk, a return that he was *annuatim eligibilis* is not bad.

FIRST, That they ſaid, that ſuch a year of *Queen Elizabeth*, and long before, they were a corporation; and ſo did not intitle themſelves by preſcription, which is ever time out of mind (*a*).

THE COURT were of opinion, that a corporation muſt either be by charter or preſcription, which is ever time out of mind; and therefore the authorities were allowed for law: but yet the exception was diſallowed, becauſe it was only failing in a matter of ſurpluſage. 2. Sid. 33.

SECONDLY, It was excepted, that it was not returned, that the town-clerk was actually choſen annually, but only that he was *an-*

(*a*) See the caſe of Sutton Hoſpital, 10. Co. 1. Cro. Eliz. 168. The Year-Book 12. *Edw.* 4. fo. 8. Bagg's Caſe, 11. Co. 93. Raſt. Ent. 3. and Dyer, 7.

TRINITY TERM,

The Twelfth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir Thomas Powys, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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* Miles *againſt* Williams.

Caſe 88.

DEBT UPON BOND brought againſt the defendant and his wife. They pleaded in bar, that the bond was entered into by the wife *dum ſola*; that a commiſſion of bankruptcy iſſued out againſt the huſband, who in all points conformed himſelf to the ſtatute about bankrupts; and ſo both defendants ſay, that by virtue of the ſtatute he became a bankrupt, *per quod* the debt was diſcharged; *et hoc parati ſunt verificare.*

If debt be brought againſt a man and his wife, on a bond by the wife *dum ſola*, they may plead a diſcharge by the bankruptcy of the huſband; but if the plea conclude *hoc parati ſunt verificare*, it is bad on a *ſpecial demurrer*; for it ſhould have concluded to the country. S. C. poſt. 243. S. C. Gilb. 318. S. C. 1. Peer. Wms. 249.

To this plea the plaintiff demurs ſpecially.

FIRST, Becauſe a bond entered into by the wife *dum ſola fuit*, is not diſcharged by the bankruptcy of the huſband.

SECONDLY, Becauſe they ought to have concluded their plea to the country.

* MR. SALKELD, *for the plaintiff*, argued, that at the common law, no perſons were allowed to avoid actions, by pleading diſability in themſelves (*a*). That properly ſpeaking, no man can be

(*a*) Beverley's Caſe, Cro. Eliz. 516. 4. Co. 123. The following caſes were alſo quoted in the argument: Year Book 43. *Edw.* 3. pl. 95. Fitz. Abr. 1211. c. 120. Drue *v.* Horn, Allen, . Ludlam *v.* Brownhill.

ſaid

MILES *againſt* WILLIAMS.

ſaid to be a debtor, but *ex ſuo contractu*. It is not pretended, that an executor would be excuſed and diſcharged, by this ſtatute, of all debts he ſtands charged with as executor; and yet the executor is as properly a debtor as the huſband in this caſe, marriage not at all altering the nature of the contract; for it was not in the power of the wife, by any act of her's, to diſſolve her own contract; nor could the huſband, for he is a third perſon. This indeed the huſband can do, he can make himſelf liable; and this he has done *ratione connubii*; but this hinders not, but that the wife may ſtill remain chargeable, *ratione contractûs*. If the huſband die, his executor is not chargeable with this debt; and if the wife die, the huſband is not liable, which plainly ſhews it to be *properly* the debt of the wife. In the caſe of *Revell v. Grey* (*a*) it is reſolved, that a debt of the huſband and a debt of the wife cannot be joined in one action brought againſt huſband and wife; which certainly they might, if ſo be that after coverture, the debt of the wife was, in a ſtrict and proper ſenſe, the debt of the huſband. In the caſe of *Boylſton v. Radcliffe* (*b*), *A.* and *B.* were obligees in a bond, one of them becomes a bankrupt, and it was reſolved, that this debt was not aſſignable. If this bond had been made to huſband and wife, it had reached the equity of the preſent caſe; for it ſeems plainly againſt equity, that a debt due from the wife ſhould be diſcharged by the bankruptcy of the huſband; and yet that the creditors of the huſband cannot have the benefit of debts due to the wife. * And though chattels perſonal cannot remain in jointure after marriage, yet *choſes in action* may. The huſband cannot ſue alone upon a bond given to the wife *dum ſola*, which proves it a debt ſtill due to the wife. As the nature of the contract is not altered by the marriage, but only the power of the wife ſuſpended; ſo neither is the nature of the contract altered by bringing of the action. But indeed, after judgment, *tranſit in rem judicatam*; and it is the judgment that gives the huſband a new right, and will make it go to his executors.—But ſurely this Court will never eſteem an act of bankruptcy of equal force with a judgment. The plea ought to cover the wife as well as the huſband; but the wife is not a bankrupt, becauſe the huſband is ſo; for by the law of *England*, the wife ſhall ſhare in the honours and advantages, but not in the *pœnis et criminibus* of her huſband. A man covenants not to ſue huſband and wife, upon a bond entered into by the wife *dum ſola*, during the life of the huſband; afterwards, contrary to this agreement, he puts the bond in ſuit; this covenant cannot be pleaded in bar, but muſt be pleaded in abatement only. It was further inſiſted upon, that no plea could be good for the huſband and wife, but ſuch a plea as would have been good for the wife had ſhe remained unmarried.

* [162]

MR. FORTESCUE, *for the defendant*, inſiſted, that what was due to the wife was, in the ſtricteſt ſenſe, a debt belonging to the

(*a*) Hob. 184. (*b*) 1. Lev. 17. S. C. Raym. 6.

huſband;

husband; for the very definition of a debt, according to *Bracton* (*a*), is what a man can recover by action, and that to his own use. The last part of the definition was what he chiefly relied upon, as that which distinguished it from the case of *Boylston v. Radcliffe*, about the joint obligees; and also from the case of an executor, who * sues *jure repræsentationis, in alieno jure*; and recovers not for himself, but for another's use. In *Calvin's Lexicon*, "a debtor" is defined to be one that may be sued against his will; and so may the husband. Against an executor who is sued as such, the action must be in the *detinet* only; for the word "*debet*" would not be true, since he is not sued for his own debt, but the testator's; whereas an action brought against husband and wife must be in the *debet* and *detinet*; which shews, that the law of *England*, upon marriage, considers the debts of the wife as the debts of the husband (*b*). In this case no remedy is to be had against the wife: she cannot be taken in execution; and therefore the husband, who alone is liable to execution, is debtor. A release by the husband, in case of a debt to the wife, would be a release in his own right; whereas an executor releases *in alieno jure* (*c*). So when the husband sues, he sues in his own right, derived to him from the marriage (*d*). It is true, that a debt due upon a bond made to the wife *dum sola*, will (unless recovered by the husband) survive to the wife: but from thence it necessarily follows, that this must have been a debt vested in the husband at the time of his death, according to the rule among joint-tenants, that nothing accrues to the survivor, but what was in jointure at the time of the death of his companion. *Nihil accrescit ei, qui nihil habuit in re unde accrescerat jus.* If now a debt due to the wife *dum sola*, does vest in, that is, become due to the husband, by a parity of reason a debt due from the wife *dum sola*, ought to be esteemed a debt from the husband, that is, a debt of the husband's. Nor is it any objection against its being esteemed his debt, that he is chargeable with it during his life only; for as a feoffment made by tenant in tail creates a fee-simple, though it is possible the fee-simple may * last but an hour; so though the husband is only chargeable with this debt during his life, yet as long as he lives it is his debt. *Choses in action* are assignable (*e*). By the statute 1. *Jac.* 1. c. 15. debts for the benefit of the bankrupt are assignable.

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Cases quoted, Noy, 142. 505. 2. Keble, 331. 1. Chancery Rep. 71.

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* [164]

THEN *it was argued*, that there was no inconvenience in making the debts due to the wife assignable; for this is no harm to the wife, since she knew that the husband had power to receive or assign her interest (*f*): but great inconvenience of the other side, by enabling the bankrupt to shelter all his estate (by assigning it) in the name of his wife, and so putting it out of the power of the

(*a*) Bract. Lib. 3. cap. 1.
(*b*) Year Book 20. *Hen.* 6. pl. 22. 9. *Edw.* 4. pl. 24.
(*c*) Hale's Analysis of the Law, page 47.
(*d*) Year Book 47. *Edw.* 3. pl. 23.
(*e*) Year Book 27. *Hen.* 6. pl. 9.
(*f*) 1. Cro. 187. 1. Vent. 10. 1. Keb. 167.

commissioners

MILLS *againſt* WILLIAMS.

commiſſioners of bankruptcy. Suppoſe, in caſe of ſuch an aſſignment, the bankrupt will not (becauſe it is not for his intereſt), and the aſſignees of the commiſſioners cannot ſue, What becomes of the eſtate in the mean time? If then debts due to the wife are, as well as other debts, due to the huſband, aſſignable to the commiſſioners, common equity requires that debts due from the wife ſhould be diſcharged by the ſtatute of bankruptcy, as well as thoſe that are due only from the huſband. This conſtruction is even advantageous to the plaintiff, by preventing him from ſuing a bankrupt; one that he can get nothing by, unleſs he be a felon, which is not to be ſuppoſed. It is ſomething ſtrange that a man ſhould be both a bankrupt and not a bankrupt at the ſame time; a bankrupt as to his own eſtate, but not as to his wife's. It was obſerved from the clauſe in the act, whereby it is criminal for bankrupts to conceal monies or effects, whereof any perſon in truſt for them ſtands poſſeſſed, that it is plain that the bankrupt is bound to diſcover a bond entered into to the wife *dum ſola*; and if he is bound to diſcover, then it muſt be aſſignable; * and conſequently, by parity of reaſon, a bond debt from the wife *dum ſola*, muſt be diſcharged.

* [165]

REPLY *for the plaintiff.* The caſe of the releaſe is not to the purpoſe; for it muſt be a releaſe of "all demands;" and that will releaſe the debt to the wife, becauſe the huſband only could demand it: but a releaſe of "all actions" would not releaſe it (*a*). A bond given to *a feme ſole*, is not forfeited by the outlawry of the huſband (*b*). As to the caſe of a bond given to a *feme ſole*, who marries, and her huſband dies, it is an improper expreſſion to ſay the bond *ſurvives* to the wife, it does indeed *remain* to her. It is true, that debts in truſt for the bankrupt are aſſignable; but ſurely it does not from thence follow, that a bond entered into, to the wife *dum ſola*, is ſo; for ſuch a debt can never be ſaid, in the original or creation of it, to be a debt in truſt for the huſband; and if ſuch a bond is not diſcoverable, it is not aſſignable, and by parity of reaſon this debt is not diſcharged. As to the inconvenience pretended, that this would open a way to ſhelter an eſtate under the wife's name, the anſwer is eaſy, that that can never be done without fraud, which will vitiate the whole contrivance.

SIR THOMAS POWYS, lately a Judge in the court of king's bench, deſired the next time this caſe was ſpoken to, that it ſhould be more diſtinctly argued, whether upon ſuppoſal that a bond made to the wife *dum ſola* was aſſignable to the commiſſioners, it did neceſſarily follow that the bankruptcy of the huſband would diſcharge a bond given by the wife *dum ſola*?

Adjournatur (*c*).

(*a*) Year Book 21. *Hen.* 7. pl. 29.

(*b*) Noy, 6.

(*c*) This caſe was argued again in Trinity Term, the thirteenth of *Queen Anne*, and the Court was of opinion that this was a debt provable under the commiſſion of *Williams*, and conſequently that it was diſcharged by his certificate; but judgment was given for the plaintiff, becauſe the plea ought to have concluded to *the country*, and not with a *verification*. Poſt 243.

Cravenor

* Gravenor *againſt* Stephens. Caſe 89.

THIS was A WRIT OF ERROR; and an error in fact was aſſigned, *viz.* that the plaintiff was a *feme covert* at the time of the action brought.

Matter pleadable in abatement, cannot be aſſigned as error in fact.

Sed non allocatur; becauſe it might have been pleaded in abatement. And it is a general rule, not to ſuffer that to be aſſigned for error in fact, which might have been taken advantage of by being pleaded in abatement.

Weltale *againſt* Glover. Caſe 90.

ACTION OF DEBT upon a bond. The defendant pleaded a releaſe. The plaintiff replied, that the releaſe was not by deed, *et de hoc ponit ſe ſuper patriam.*—The defendant demurred ſpecially, becauſe he ought not to have concluded, *et de hoc ponit ſe ſuper patriam*, but *et hoc petit quòd inquiratur per patriam.* Joinder in demurrer.

In debt on bond if the defendant plead *a releaſe*, and the plaintiff reply that the releaſe was not by deed, a concluſion *et de hoc ponit ſe ſuper patriam*, is good.

MR. DEE, *for the defendant*, argued, that though indeed both forms of ſpeech bore the ſame ſenſe, yet that the form of entries was always ſo; that *de hoc ponit ſe ſuper patriam*, was the concluſion of the defendant's bar, and *hoc petit quòd inquiratur per patriam*, of the plaintiff's replication; that known and received forms were to be obſerved; and that to depart or vary from them, was an obſtinacy not to be encouraged, particularly when ſpecially demurred to. It is ſaid in the Year-Book of *Henry the Sixth* (*a*), that every plea muſt have its proper concluſion. *Plowden* (*b*) ſays, that after pleading the ſpecial matter, the concluſion of the plea muſt be, *et ſic non eſt factum*; which can be only for form ſake, for the matter of ſpecial pleading ſhews the bond to be void without the concluſion. In a ſecond deliverance, "*et de tali ſtatu ſuo obiit inde "ſeiſitus*," is a form always obſerved; and therefore the words *de tali ſtatu ſuo* being omitted, though other words of the ſame * import were put in, it was held naught, and ordered to be amended (*c*). And if forms of law, unſupported by any neceſſity, nor founded in the reaſon of the thing, are to be ſtrictly adhered to, the plaintiff ought not to be allowed the liberty of varying the received and known concluſion of his plea; though he has uſed expreſſions, it muſt be owned, equivalent in ſenſe.

MR. AGAR, *for the plaintiff*, argued, that this way of pleading occaſioned no inconvenience or alteration of law; and that the law does not always tie up men to any certain forms, provided they uſe other words as proper. When the plea is in the negative, as the plaintiff's replication here was, *et de hoc ponit*, &c. is a more proper

(*a*) Year Book 28. *Hen.* 6. pl. 19. (*b*) Dyer, 243.
(*b*) In the caſe of Dive *v.* Manningham, Plowd. Com. fol. 66.

WELTALE *againſt* GLOVER.

concluſion than *et hoc petit, &c.* for a negative is not to be proved. And the reaſon why moſt commonly the plaintiff concludes one way, and the defendant another, may perhaps be thus accounted for, that moſt of the general pleas being in the negative, it would be ſomewhat abſurd for a man who concludes his plea in the negative, to deſire that his plea may be inquired of *per patriam*. He confeſſed that the general courſe of entries was againſt him; and that *Co. Lit* 126. ſays it is ſo; but not that it muſt be ſo. Then he quoted *Raſtall (a)*, and the caſe of *Jefferies v. Dee (b)*, where the precedents were all with him.

PARKER, *Chief Juſtice*. The difference taken by MR. AGAR, between negative and affirmative pleas, ſeems to me very reaſonable. And I think it highly probable, that the original reaſon, why the entry for the defendant has been *et de hoc ponit, &c.* and that for the plaintiff *et hoc petit, &c.* might be, that for the moſt part general iſſues are in the negative, and replications in the affirmative. The queſtion is not which way the ſtream and current
* [168] of precedents run, for that MR. AGAR gives up, and he * muſt do ſo; but whether it be a form ſo neceſſary, that a ſmall variation (and that not in ſenſe) from it will be erroneous, and, upon a ſpecial demurrer, prevent the plaintiff's having his judgment. Not one authority has been cited to prove this. MR. AGAR has mentioned four or five precedents, not to overthrow or alter the general form of precedents, but only to prove that this form of words is not eſſentially neceſſary. Beſides, it is to be conſidered, that theſe words now objected to are legal words, not fanciful words of the party's own invention. For the writ of *venire* recites of both parties, *quòd poſuerunt ſe ſuper patriam*; and then the entry, *prædictus ſimiliter* the plaintiff, &c. imports that he too *ponit ſe ſuper patriam*; the very words here are objected to as improper for the plaintiff. So again, when the plaintiff concludes, *et hoc petit quòd inquiratur per patriam, &c.* the entry is, *et prædictus defendens ſimiliter, &c.* VIZ. *hoc petit, &c.* from whence it manifeſtly appears, that neither of theſe expreſſions are improper for either of the parties to uſe.

THE REST OF THE JUDGES being of the ſame opinion, judgment *niſi* was given for the plaintiff.

(*a*) Raſtal's Entries, 20. 36. 324. 500. 616. 633. (*b*) 1. Lev. 281.

Caſe 91.

Skinner *againſt* Newton.

A declaration in treſpaſs, that the defendant with force and arms, three *pieces* of land broke and entered, &c. of him the plaintiff, containing ſo many acres, &c. is bad.—S. C. ante, 140.

THIS CASE was again ſpoken to this Term.

IT WAS INSISTED that the declaration was naught, by reaſon of the words *tres peciastarræ* uſed inſtead of *clauſum*. It was obſerved, that

that there were ſeveral diſtinct ſpecies of actions of treſpaſs, viz. *quare domum fregit*, where treſpaſs in houſes; *quare clauſum*, where in land; *quare parcum*, when in parks; *quare piſcariam*, &c. when in fiſheries. * Might it not now be ſaid, that *terram fregit* would do for any of theſe? for a grant of the land paſſes the fiſhery, houſe, &c. No, by no means; for if that might be allowed, the various ſpecies of actions of treſpaſs would be all confounded. The word "*clauſum*" imports poſſeſſion, but ſo does not the word *pecia*. And from *Yelverton* 224. it appears, that there muſt be words ſetting forth the poſſeſſion of the plaintiff by a neceſſary and not an argumentative implication. In *Rol. Abr. tit. Indict.* 80. the ſame rule is laid down in forcible entries. That the word "*clauſum*" imports poſſeſſion, appears from the definition of the word in *Du Freſne's Gloſſary*. *Somner* in his *Saxon Dictionary*, the beſt of the kind, ſays, that the expreſſion *clauſum fregit* is very ancient, and ſynonymous to our *Engliſh* word *hedge-breaking*; the law making the encloſure. Treſpaſs in a common where all is open, muſt yet be *clauſum fregit (a)*. This way of declaration will ſerve for a highway, to which everybody has a right. Where a man has a grant only of the herbage or veſture, he muſt declare *clauſum*, &c. The word "*tenementum*" in forcible entries, is held bad for the uncertainty (*b*); and ſo is 2. *Rol. Abr.* 80. In 2. *Keble*, 358. the word "*curtilagium*," though more certain than *tenementum*, is yet held bad in an indictment for treſpaſs. *Carucatam terræ fregit* is bad for uncertainty. *Pecia terræ* is bad in an ejectment (*c*). This is a formed writ in *the Regiſter*, and therefore exactly to be complied with. If it be ſaid, that this ought to be pleaded in abatement, it may be anſwered, that by 1. *Roll.* 176. it appears that this may be taken advantage of in arreſt of judgment. And 1. *Rolle's Rep.* 2. this difference is taken, that where it appears to the Court from the writ itſelf, that it * ought to abate, there the Court, *ex officio*, ought to give judgment againſt the plaintiff, though the defendant do not plead it in abatement; otherwiſe, where this does not appear in the writ.

* [169]

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FOR THE DEFENDANT *in error* it was argued, that the word "*clauſum*" does not, *ex vi termini*, import poſſeſſion, without the addition of the word *ipſius* the plaintiff. That the only queſtion was, Whether there was certainty enough in the deſcription of this treſpaſs, for the defendant to plead the recovery in this action of treſpaſs, in bar of another action brought for the ſame treſpaſs? and that it appears from the declaration, that for this purpoſe there is certainty enough. The end of the declaration in treſpaſs is, to deſcribe the treſpaſs ſo certainly that the defendant may know how to anſwer.

EYRE, *Juſtice*. It is indeed a barbarous expreſſion; but if *gardinum fregit* be good and in *the Regiſter*, and alſo *boſcum fregit*,

(*a*) See the Year Book, 26. *Hen.* 7. pl. 14. and 2. Lutw. 1344.

(*b*) 1. Roll. 334.

(*c*) Moor, 422. 2. Vent. 174.

SKINNER *against* NEWTON.

why may not *terram fregit* be good too? The word *terra*, in legal proceſs, muſt be underſtood of arable ground; though in way of grant, it may ſignify any thing. And if it be *terram* of the plaintiff, it is *clauſum* of the plaintiff; for the law makes the incloſure. Beſides, the defendant, after pleading to it, cannot take advantage of it in error.

But notwithſtanding *(ut audivi)* in Trinity Term, in the thirteenth year of *Queen Anne*, judgment was reverſed *niſi*.

* [171]

Caſe 92.

Nutton *againſt* Crow.

If an *aſſumpſit* on ſeveral counts be brought by *an executor*, on a promiſe made to the teſtator, and as to this count the plaintiff enters a *remittitur damna*, and obtain judgment on the others; the defendant cannot ſhew, in arreſt of judgment, that it appears in the declaration that the probate was granted before the promiſe was made.

THIS was an *indebitatus aſſumpſit* upon three promiſes, brought by the plaintiff as executor to *B.* As to the two firſt promiſes, the declaration ſtood thus: that *Crow*, on the twenty-ſecond of *January* 1708, *in vitâ teſtatoris* being indebted, &c.; and upon the defendant's craving *oyer* of the letters teſtamentary, a probate is recited as made four months before the time of the promiſes. * The third promiſe was a promiſe to the executor himſelf, upon the ſtating of the accounts between the executor and defendant, touching only the dealings between the teſtator and him. The plaintiff entered a *remittitur damna* upon the two firſt promiſes given, and obtained judgment upon the third in the court of common pleas.

Upon error brought, two things were chiefly inſiſted upon.

FIRST, That it appeared of the plaintiff's own ſhewing, that this will was proved in the life-time of the teſtator, and ſo was a void probate. And it was ſaid, that this was an objection that went to all the three promiſes; and therefore was not helped by the *remittitur*; for a void probate is no probate at all; and though an executor may releaſe before a probate, yet he cannot bring an action. 9. *Co.* 38. *Co. Lit.* 292. *b.* *Plowd. Com.* 203. 1. *Roll. Abr.* 917.

SED NON ALLOCATUR: for it is as natural to ſay, that the time alledged for making the promiſes was miſtaken, and then the probate may be good, as to ſay, *vice verſa*, the promiſes were well ſet forth, and the probate void; eſpecially when the party has, by entering a *remittitur*, yielded the promiſes to be naught.

A declaration in *aſſumpſit* by an executor, ſtating a promiſe made to himſelf upon an account ſtated, relative to the dealings between the teſtator and the defendant, is good. 2. Stra. 1271.

SECONDLY, That here were promiſes made to *the teſtator*, and a promiſe made to *the executor*, all joined in one action, which ought not to be (*a*). It was owned, that there is a difference taken between actions brought by, and actions brought againſt, an executor or adminiſtrator (*b*). That an executor might join in one action, a debt owed him *in his own right*, and a debt owed him *as executor*; but an executor could not be ſued in one and the ſame action, for a debt due from him as executor, and a debt due from him on his own account. And the reaſon aſſigned for this difference, is, that in the firſt caſe the judgment remains

(*a*) (*b*) 2. Lev. 228.

* ſtill

NUTTON against CROW.

* ſtill the ſame, notwithſtanding the joining the two debts; whereas in the other, the judgment muſt be different, *viz.* in the one caſe *de bonis teſtatoris*, and in the other *de bonis propriis*. But then it was ſaid, by way of anſwer to this caſe, that the reaſon given to ſupport the difference had no weight. For though indeed, in the firſt caſe, the judgment muſt be the ſame, yet the effect of that judgment is very different; for the one debt is recovered to his own uſe; the other debt, when recovered, will be aſſets. And then the caſe of *Beamond v. Long* (*a*), and of *Rogers v. Cook* (*b*), contradict this caſe. A caſe in *Hobart*, 88. was owned a ſtrong caſe againſt them; but they endeavoured to oppoſe it by other authorities, as *Hutton*, 27. 2. *Lev.* 110. and it was ſtrongly inſiſted upon, that the nature of the action was changed, at leaſt a new remedy given, by the taking of this account.

IT WAS ARGUED *for the defendant in error*, that *actions upon the caſe* came in the place of *actions of debt* upon *ſimple contract*, and were introduced merely to avoid the defendant's *waging his law*; and therefore both ſorts of actions were to be governed by the ſame reaſon, and the ſame rules. That the nature of the action was not changed by the account, appears from the nature of the thing; for the debt after the account, as well as before, is due to him *jure repræſentationis* (*c*). It was ſaid, that the law had a great regard to the original of a debt. *Cro. Eliz.* 326. *Savile*, 130. 2. *Cro.* 545. 1. *Lutw.* 893. are all of them authorities, wherein it is reſolved, that from a conſideration had to the firſt riſe and original of the debt, the action muſt be brought in the *detinet*. *Lane*, 79. and *Hobart*, 88. were ſtrongly relied upon.

THE COURT were of opinion, that the promiſes might very well be joined in one action: that the taking of the * account did * [173]
not at all vary the nature of the debt: that the plaintiff lay under a neceſſity to introduce the cauſe of action, of naming himſelf executor: that the pleading being here the ſame, judgment the ſame, and the effect of the judgment the ſame, as it would have been in ſeparate actions, there could be no reaſon given for dividing them, but multiplying actions, which the law abhors, and againſt MAGNA CHARTA, "*nulli negabimus, nulli differemus, &c.*" *Hobart*, 88. was held to be a ſtrong authority for the defendant in error. But it was agreed by the Court, that an executor could not be ſued for debts due from the teſtator and himſelf in one and the ſame action, becauſe the judgment is different.

Adjournatur (*d*).

(*a*) Cro. Car. 227.

(*b*) 1. Show. 366.

(*c*) See the Year Book 20. *Hen.* 6. 4. and 5.; 9. *Hen.* 6. pl. 11.

(*d*) A count for money had and received by the defendant, to the uſe of the executor as ſuch, may be joined to a count for money had and received to the uſe of the teſtator; but a count for a debt due to the executor in his own right cannot. Petrie, Executor of Keble, *v.* Hannay, 3. Term Rep. 659. Nor can a count on a promiſe made by the defendant, as adminiſtrator, to pay money received by him as ſuch to the plaintiff's uſe, be joined with other counts on promiſes made by the inteſtate. Jennings *v.* Newman, Adminiſtrator, 4. Term Rep. 347.

Case 93. The Queen *againſt* The Corporation of Buckingham.

Qu. If to a *mandamus* to reſtore a corporator to the office of burgeſs, it is a good return that he was *de facto* elected, but that not having received the ſacrament according to 13. *Car.* 2. c. 2. his election was void.

THIS was *a mandamus* to the corporation of *Buckingham*, to reſtore one *Muſcot* to the office of a common burgeſs of that corporation.

The return in ſubſtance was, that *Muſcot de facto fuit electus*; but that he not having received the ſacrament within a year before his election, according to the ſtatute 13. *Car.* 2. c. 2. his election was void (*a*).

MR. LECHMERE, *againſt the return*, argued, that the very foundation of *a mandamus* to reſtore, is the wrongful turning a man out of at leaſt a poſſeſſory right to a franchiſe; and therefore properly, and in its own nature, it is a writ of reſtitution. And accordingly in the *Analyſis of the Law*, now publiſhed from a manuſcript of *Lord Hale*, it is expreſsly called a writ of reſtitution; which, *ex vi termini*, imports poſſeſſion. It is not neceſſary for one who has a poſſeſſory right to a franchiſe, to have a legal title to it. This is in its * own nature a freehold; and becauſe it is *juris publici*, the law has a greater regard to the poſſeſſion of ſuch a freehold than to any of a private nature. If upon a preſentment without title, inſtitution and induction follow, the party has ſuch a poſſeſſory right as he ſhall not loſe without a *quare impedit*. The *debite admiſſus*, according to the conſtitution of the borough being not at all anſwered by the return, muſt now be looked upon as true; and for the ſame reaſon, it muſt now be taken for granted, that he has been guilty of no miſbehaviour ſince his election. The admiſſion, not the election, makes the officer; and though the ſtatute ſays "the "election ſhall be void," it ſays nothing of the admiſſion. There are various returns made to *mandamus's* to reſtore. "*Non fuit* "*amotus*," is the moſt common return; and this return goes to the very foundation of the writ. "*Non fuit admiſſus*," is a good return: amotion depends upon the admiſſion; and therefore "*non fuit* "*admiſſus*," is but a ſpecial *non fuit amotus*. In the caſe of *The King v. Town of Cambridge* (*b*), *a mandamus* iſſued to admit *Love* and others, and a return of any ſubſequent incapacity was reſolved to be a good return. Confeſſing the amotion and juſtifying is a very common ſort of return. He obſerved, that in all theſe returns the election was not anſwered; from whence it follows, that it is not a neceſſary and eſſential part of the writ. In *James Smith's Caſe* (*c*), juſt after the Revolution, the election was anſwered; but then it was anſwered in ſuch a manner, as plainly ſhews it not neceſſary to be anſwered. Beſides, the argument does by no means hold, that becauſe it was to be found in ſome returns, that they had anſwered the election, therefore it is a neceſſary part of the writ; but the ar-

S. C. poſt. 178.

* [174]

1. Siderfin, 209, 210.

1. Lev. 162.

(*a*) See the caſe of The Queen *v.* The Mayor and Burgeſſes of Pomfret, Ante, 107, 108.; and The Queen *v.* The Borough of Aldborough, Ante, 100.

(*b*) 8. Mod. 148.

(*c*) 4. Mod. 52.

gument

gument holds ſtrong the other way, that becauſe it is often not answered, therefore it is no neceſſary part of the writ. He obſerved, that unleſs the reaſon returned for not reſtoring him was a good reaſon for their turning him out, it was not a good reaſon. * He affirmed, that a corporation, after their admiſſion of him as duly elected, had no power or authority to call in queſtion the title of him, or the reſt of their members; and that it muſt by no means paſs for granted, that they may disfranchiſe a man for every cauſe for which he may be proceeded againſt upon a *quo warranto*; becauſe there is this great difference between proceedings by *quo warranto*, and the turning a man out; that in the former caſe, the man remains in poſſeſſion of his franchiſe during the time the right is in diſpute; whereas in the other, the man is all the while out of poſſeſſion; which is a wrong, that reſtoring him afterwards does not make him ſufficient amends for. *James Bagge's Caſe* (*a*) is a leading caſe as to *mandamus's*, and this was a *mandamus* to reſtore; and there it was laid down, that a disfranchiſement ought to be founded upon ſome act done againſt the duty of a burgeſs. A power of disfranchiſement is not a power incident to a corporation, and what the Court can, *ex officio*, take notice of; but it muſt be given by expreſs words in the charter, and pleaded, which here it is not. If corporations have a power to judge of elections, they muſt neceſſarily judge of acts of parliament concerning them, they muſt judge the right of electors, &c. a juriſdiction too great to be ſuppoſed veſted in a corporation. It ſeems abſurd for a corporation to turn a man out for an act of their own, and not any fault committed by him; for the election is a corporate act; and ſhall they after they have allowed and admitted it good, by owning and receiving him as a member, be allowed to come and call this a void election? Then it was urged, that this is a very dangerous as well as needleſs power, becauſe it would give a corporation a power to rid themſelves of what members they pleaſe; for let a man have ever ſo much right on his ſide, yet he muſt loſe his franchiſe during the whole time * of diſpute; and it is likewiſe a very needleſs power, becauſe the law has ſufficiently provided for it by *quo warranto*.

* [175]

* [176]

ANOTHER EXCEPTION was, that it was not averred in the return that the reaſon they give for not reſtoring him, was the reaſon for which they turned him out. And that this is neceſſary appears from *Bagge's Caſe* (*b*), where it is expreſsly ſaid in the return *ex cauſis prædictis amotus fuit*. And if this were not ſo, a wrongful expulſion might come to be a rightful one; for if it need not appear in the return for what cauſe he was expelled, any accident happening between the removal and the return will in fact juſtify the removal.

THEN IT WAS OBSERVED, that the return was contradictory to itſelf; for it was ſaid, in the firſt place, that *de facto fuit electus*,

(*a*) 11. Co 93. (*b*) 11. Co. 97.

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and afterwards that his election was void, he not having received the ſacrament. Now *electus*, in one part of the return, muſt bear the ſame ſenſe as in the other, unleſs the addition of the words *de facto* makes any alteration, which he ſuppoſed they did not.

MR. LUTWYCHE *for the return* (*a*). The act of parliament of 13 *Car.* 2. c. 1. ſays, "that the placing election or choice of a "perſon not having, &c. ſhall be void:" and where an act of parliament makes a thing abſolutely void, every perſon may and ought to take notice of it. No precedent is to be found of any *mandamus* without the ſuggeſtion of *debite electus et præfectus*, which ſuppoſes it a neceſſary part of the writ, and then neceſſary for it to be anſwered. There is a difference between an election void and voidable: that in the preſent caſe is not voidable, but void. And the act of parliament in ſaying the election ſhall be void, has in effect ſaid, there ſhall be no proceedings by *quo warranto*. As to the caſe of the advowſon, it is *nihil ad rem*, becauſe there is no act of parliament in the caſe. But in the caſe of a ſimoniacal preſentation, notwithſtanding inſtitution or * even induction, the preſentation is abſolutely void; and the church may be preſented unto as void, without bringing any *quare impedit*. In caſe of an ejectment, unleſs the perſon turned out, though by one that has no right, can prove his right, he ſhall not recover, and this is a poſſeſſory action. As to the objection, that this way a corporation may have it in their power to rid themſelves of what members they pleaſe: the anſwer is, that this objection implies malice, and if a corporation be malicious, they may turn a man out for nothing, and then may return for cauſe any falſe crime they think fit, and in the mean time the man is out of his franchiſe.

[177]

LECHMERE *in reply*. A great part of MR. LUTWYCHE's argument turns upon this, that the ſtatute makes the admiſſion as well as election void; whereas the ſtatute ſays not a word of admiſſion, unleſs the word "placing" be interpreted to mean *that*. Now from the word "placing" being put before "election," it is highly probable that it had no relation, in the intention of the legiſlators, to admiſſion, an act ſubſequent and conſequential of election; and *ex vi termini*, "placing" no more imports admiſſion than it does election. Poſſibly the term "placing" may, in the act, ſignify ſome other way of coming in than by election, *viz.* by patent; a frequent practice in thoſe days when the act was made. As for the advowſon; that was mentioned only to ſhew, that the law allows of a poſſeſſory right, even in matters of an incorporeal nature, as well as in land. As to ſimony, the act of parliament relating to that matter is very different from this, for it makes all void, as if the incumbent were naturally dead.

Adjournatur.

(*a*) In favour of the return the following caſes were cited, Rex *v.* Thacker, 3 Jones, 131. Rex *v.* Slalford, 428. 5. Mod. 316. Rex *v.* Mayor of Abingdon, Salk. 431. 2. Lev. 184.

* SIR

* SIR PETER KING made another argument, in the caſe of another perſon; but where the return was the very ſame as before.

Qu. If in a return to a *mandamus* to reſtore a burgeſs, that he was in fact elected but that not having taken the ſacrament within a year, his election was void, it is neceſſary to ſtate that it was void by 13. *Car.* 2. c. 2. S. C. ante, 173.

FIRST, He objected, that in the return they had not ſet forth, that the act of parliament made the election void; it was only ſaid, that in default thereof, ſuch placing, &c. was void," but not ſtated by what authority it was void.

SECONDLY, He objected, that the return had not brought the office within the act of parliament; for the office of capital burgeſs is not named in the act of parliament. It was, indeed, attempted to be brought within it two ways: FIRST, By ſetting forth, that it was an office relating to the government of the town. But this is not enough, unleſs they had gone one ſtep further, and ſhewn how the office concerned the government of the town, that ſo the Court might judge whether it did or not.—THE SECOND way is, that as the act mentions common-council-men, they ſaid "*quod quilibet communis burgenſis*" was, and has been ſince, a member of the common-council. But this is not enough; for they ought to have ſaid, that "*quilibet communis burgenſis, virtute officii prædicti,*" was a member of the common-council.

THIRDLY, He objected further, that the return had not ſufficiently anſwered the writ. The writ avers him to be *debite electus et præfectus*, which is no anſwer. They ſhould have done as in pleading to bond uſurious, or ſimoniacal, admitted the fact, viz. *quod debite fuit electus*, and that *electio devenit vacua.*

FOURTHLY, As the election is not properly anſwered, ſo neither is the *præfectus.* A man may come in either *by election* or *by præfection*, that is, placing in of the crown. They ſay, that * he was never at any other time *electus*; but it is not ſaid, that he never was at any other time *præfectus.* * [179]

POWYS, *Juſtice*, upon a former argument in this caſe, had deſired the Counſel to conſider, whether the act did not make the taking the ſacrament a precedent condition to the office?

SIR PETER KING, in anſwer to this, put the following caſe: Suppoſe a man having received the ſacrament within the year, applies to be ſworn in, is refuſed, then gets a *peremptory mandamus*, afterwards he refuſes to ſubſcribe, can any man ſay, that contrary to the expreſs judgment of this Court, he was never elected? And yet the act of parliament is as ſtrongly penned to make the election void for not ſubſcribing, as for not taking the ſacrament; therefore it is plain, that neither the omiſſion of the one or the other makes the election void, but only capable of being avoided. This further appears from the caſe of *King v. Larwood* (*a*), for if the

(*a*) 4. Mod. 269.

taking,

THE QUEEN *against* THE CORPORATION OF BUCKINGHAM.

taking, &c. had been in nature of a precedent condition, *Larwood* could never have been puniſhed, becauſe he would not have been legally choſen into the office (*a*). The ſtatute *De Donis* ſays, a fine ſhall be *ipſo jure nullus*; and yet the meaning is not, that it ſhall be abſolutely void, but only that it ſhall not be a fine to bar the iſſue; for it is a fine to make a diſcontinuance, &c. The ſtatutes relating to ſheriff's bonds, and uſurious bonds, are penned in very ſtrong terms, and yet the bonds are void only as to their efficacy; for in thoſe caſes, one cannot plead *non eſt factum* (*b*). The ſtatute about ſtriking in church-yards ſays, "that the party *ipſo facto* ſhall be excommunicate; and yet a proper proceſs is neceſſary (*c*). If by the ſtatute of Simony, the ſimoniacal preſentation were entirely and to all intents and purpoſes void, the * queen would have no title at all to preſent; for it is the manner of the preſentation that gives the queen the title. A thing may be void, and yet not to be avoided in every manner (*d*). He argued from the reaſon of the caſe *The King v. Turner* (*e*), that it did not lie in the breaſt of the corporation, contrary to their own admiſſion, to call in queſtion the validity of the original election; and though this would be no good anſwer to the crown, yet to the corporation it is, You have admitted him. In the laſt place, he held it neceſſary for it to appear in the return that they had ſummoned him (*f*).

* [180]

EYRE, *Juſtice*, declared his preſent opinion to be, that the acts of parliament inſtanced to prove the election not *void*, but only *voidable*, did not reach the preſent caſe; becauſe all of them related either to matters of record, or ſpecialties entered into with ſome ceremony; and therefore although the ſtatutes made them void, yet it muſt be underſtood in a proper manner, and acts of parliament do always ſuppoſe neceſſary incidents; but now this caſe is the caſe of an election, a matter *in pais*, and ſo very different.

(*a*) See Clerk's Caſe, 2. Vent. 247. where the election was held void for want of taking the ſacrament: See alſo, The Queen *v.* The Borough of Aldborough, Ante, 100.

(*b*) Cro. Eliz. 915. Dyer, 375. Hob. 72. 166.

(*c*) 2. vol. Hawk. P. C. ch. 63. ſ. 27. title "Affrays."

(*d*) Hob. 166.

(*e*) T. Jones, 215.

(*f*) See Reg. *v.* Aldbrough, Ante, 101.

MICHAELMAS TERM,

The Twelfth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir Thomas Powys, *Knt.*
} *Juſtices.*

Sir Edward Northey, *Knt. Attorney General,*
Sir Robert Raymond, *Knt. Solicitor General.*

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* Backhouſe *againſt* Wells, Caſe 94.

THIS was an ejectment; and the queſtion aroſe upon the conſtruction of a will, whether the words of it made the deviſee only tenant for life or tenant in tail?

The deviſor being ſeiſed in fee of the lands in queſtion makes his will thus: "To the intent that all my lands ſhould remain in "my name and blood, I deviſe to *J. S.* my near kinſman, ſuch "and ſuch lands, &c. to have and to hold, for the term of his "natural life only, without impeachment of waſte; then to the "iſſue male of his body, lawfully to be begotten, if God ſhall "bleſs him with ſuch iſſue; remainder to the heirs males of the "body of that iſſue."

LUTWYCHE *for the plaintiff* argued, that the deviſee was, by this will, only a tenant for life, and ſo conſequently had no power to levy a fine, or ſuffer a common recovery, under which the defendant claimed. * That this was the intention of the teſtator appears, Firſt, From the preamble, which ſignifies it to be his intention, that his lands ſhould "remain in his name and blood;" from whence it is not probable that he would, by making the firſt

S. C. Gilb. 20. S. C. cited 8. Mod. 261. S. C. cited 2. deviſee

A deviſe "to "*A.* for life, "without im- "peachment of "waſte, and "after to the "iſſue male of "his body, with "remainder to "the heirs male "of the body of "that iſſue," conveys to *A.* an eſtate for life, with remainder to the iſſue in tail.—*Sed quære.*

S. C. 1. Eq. Ab. 184. S. C. 2. Stra. 731. S. C. Fort. 450. Ld. Ray. 1439.

BACKHOUSE *against* WELLS.

deviſee tenant in tail, put it in his power, by ſuffering a common recovery, to bar, &c. Secondly, This appears to have been his intention from the words of the will, which are, "to have and to "hold for the term of his natural life only." The clauſe likewiſe "without impeachment of waſte" had been needleſs, if the teſtator had deſigned to make him tenant in tail. And from the words, "to the heirs males of the body of that iſſue," it was inferred, that the teſtator plainly deſigned to veſt the intail in the iſſue, and not the firſt deviſee. If in a will ſuch proper words are made uſe of as would in a deed paſs ſuch an eſtate, nothing but the plain intention of the teſtator to the contrary ſhall ever put another conſtruction upon the words (*a*). A deviſe to a man and his children, where the man has no children, muſt paſs an eſtate-tail, becauſe it muſt be the intention of the teſtator to have it ſo; and otherwiſe the word "children" would be of no ſignification. The caſe of *King v. Melling* (*b*) is very different from the caſe at bar. There was not in that caſe the reſtrictive word "only," and the clauſe "without impeachment of waſte," as in ours. Beſides, there HALE argued ſtrongly from the intention of the teſtator, which in a will, and alſo in an eſtate-tail, of which the ſtatute ſays "*voluntas donatoris, &c.*" ought to carry great weight. Now
* [183] here the intention of the teſtator is ſtrongly with us. * From the difficulty with which the judgment was given in the caſe of *King v. Melling* it appears, the Judges went as far as they could go. And the caſe of *Taylor v. Sayer* (*c*) has been ſeveral times denied to be law.

LECHMERE *for the defendant* argued, that no ſuch intention could be collected either from the preamble or from the words of the will. As to the preamble, it muſt be conſidered as a general preamble, that extends to the whole will, and conſequently to all the deviſes in the will, as well as to the deviſe in queſtion; and therefore, from the preamble it cannot appear, that it was his intention to make this deviſee tenant for life, any more than ſome others that he has confeſſedly made tenants in tail. Indeed it does appear what were his motives in the choice he made of deviſees, *viz.* their being of his name and family, but nothing further. As for the obſervation made from the clauſe "without impeachment of waſte," it is in other parts of the will needleſsly inſerted, and ſo it may here. As to the inference made from thoſe words, "if God ſhall bleſs "him with ſuch iſſue," that they import a deſign of giving a contingent remainder to that iſſue; it was anſwered, that the preceding words, *viz.* the remainder "to the iſſue male of his "body lawfully to be begotten," were the operative words, and which, conjoined with thoſe that precede them, veſted an eſtate-tail in the deviſee. As to the inference from the words "to the heirs "males of the body of that iſſue," that the eſtate-tail was veſted in the iſſue; it was anſwered, that whether the eſtate-tail was veſted

(*a*) Wylde's Caſe, 6. Co. 16.
(*b*) Reported in 2. Lev. 58. and 3. Vent. 225.
(*c*) 1. Vent. 229. Ray. 82. Pollexfen, 106.

in

in the deviſee or iſſue, thoſe words muſt be ſuperfluous; for iſſue being *nomen collectivum*, without ſaying more, imports an eſtate-tail. As to the expreſſion, "for the term of his natural life only;" if the word "only" were left out, ſince the caſe of *King v. Melling*, it could be no objection. And as to that * word, it is plain tautology; for an eſtate for life is an eſtate for life only; and then the caſe remains the ſame with the caſe of *The King v. Melling*. "Iſſue" is no appropriate word of purchaſe in a will, though perhaps in a deed it may be ſo; and yet in the caſe of *Lee v. Brace* (*a*) the word "iſſue" was uſed in a deed as a word of limitation. In a will, it is a word that has no determined ſignification, but muſt be governed by other circumſtances; and moſt commonly it is uſed as a word of limitation.

BACKHOUSE *againſt* WELLS.

1. Vent. 229.

* [184]

PARKER, *Chief Juſtice*, in the next Term, delivered the opinion of THE WHOLE COURT, that by the deviſe the deviſee was made tenant for life, remainder to the iſſue in tail. The words of the will, he ſaid, were ſo expreſs to this purpoſe, that neither any words that could have been uſed, or any arguments, could make it plainer. This, he ſaid, was both the obvious and legal import of theſe words, and what they would have imported in a conveyance (*b*).

(*a*) 5. Mod. 266. 2. Ld. Ray. 101. Say. 68.

(*b*) But ſee Morris *v.* Le Gay, 2. Burr. 1102. Goodright *v.* Pullen, 2. Ld. Ray. 1437. Blandford *v.* Aplin, 4. Term Rep. 82. Robinſon *v.* Robinſon, 1. Burr. 38. —See alſo Denn on Demiſe of Webb *v.* Puchey, that by a deviſe to *A.* for life, without impeachment of waſte, and after his deceaſe to the iſſue male of his body, and to the heirs and aſſigns of ſuch iſſue male for ever, and for default of ſuch iſſue male to *B. &c. A.* takes an eſtate-tail. 5. Term Rep. 299. Cooper and Others *v.* Collins, 4. Term Rep. 294.

* [185]

Jackſon *againſt* Laveright.

Caſe 95.

THIS was a writ of error out of the court of common pleas, where an action upon the caſe was brought for incloſing ſo many acres of land, parcel *communiæ paſturæ, &c.*

An action on the caſe for incloſing ſo many acres, "*parcel. communia paſturæ*," is good after verdict; for though technically the word "*communia*" ſignifies the *right* only, and not the place of commoning, and, being incorporeal, is not the ſubject of incloſure, yet in common parlance it ſignifies *the common* itſelf.—S. C. Gilb. 13. 75. S. C. 5. Viner, 27.

IT WAS URGED, that the word "*communia*" ſignified, not the place, but the right of commoning; and a right being a thing of an incorporeal nature, was no more capable of being incloſed than a rent (*a*); and this definition of the word is given in *Fleta* (*b*), that it imports any right which a man is to enjoy in common with others *in alieno fundo*; as *communia paſturæ, piſcandi, &c.* A grant of * *communia* alone would paſs nothing. A grant of *communia paſturæ* would not paſs the ſoil (*c*); *à fortiori* in pleading it cannot import the ſoil. "*Nec non*," in pleading, amounts to an affirmative; *contra* in a grant. The reaſon of the difference is, that in pleading the rules of grammar muſt take place, but in grants the intention of the party ſhall govern the conſtruction. The

(*a*) Bracton, lib. 4. cap. 4.
(*b*) Fleta, lib. 4. cap. 19.
(*c*) Cro. Jac. 579.

JACKSON *against* LAVERIGHT.

word "*tenentes*" in pleading never ſignifies tenants for years, but *tenentes terrarum* tenants in fee (*a*). The plaintiff himſelf, in another part of his declaration, has uſed the word "*communia*" in a proper ſenſe, as ſignifying a right, *ratione inde communiam, &c. habuit.* If it be objected, that the word "*communia*" may be rejected as ſurpluſage, yet even then the declaration will remain nonſenſe; for then it will be for incloſing ſo many acres *terræ*, viz. arable land (for that is the legal import of the word *terra*), parcel *paſturæ* (*b*).

Ante, 170.

IT WAS URGED *in favour of the defendant in error*, that this word "*communia*," if it made the declaration nonſenſe, ſhould be rejected as ſurpluſage. But it was ſtrongly argued, that this word "*communia*" not being a claſſical but a legal and technical word, and being a word which in common parlance, nay in acts of parliament, ſometimes ſignifies the place, as well as right of common; might, eſpecially after a verdict, be received in the ſame ſenſe; and many are the caſes where improper and impoſſible words have been aided by a verdict (*c*).

2. Mod. 240.

EYRE, *Juſtice.* It is very hard, that after a verdict this word ſhould not receive that ſenſe which it will do in common parlance, nay in acts of parliament, and very good authors, as in *Du Freſne's Gloſſary, Vol. I.* upon this word.

* [186]

* POWYS *junior* was of the ſame opinion; for if the word was not capable of receiving this ſenſe, he did not ſee why it might not, after a verdict, be eſteemed a miſtake of the clerk inſtead of *communis.* He likewiſe thought it might be rejected as ſurpluſage; for though the legal import of the word "*terra*," when ſtanding alone, is arable, yet the word "*terra*" in conjunction with other words will ſignify all ſorts of land; as here "*acras terræ*" is conjoined with the following words, "*parcel. paſturæ terræ* "VOCAT." and thus no abſurdity at all follows the omiſſion of the word "*communia.*"

Ante, 170.

Adjournatur.

JUDGMENT was afterwards given for the defendant in error.

(*a*) Rookby's Caſe, Michaelmas Term, 9. *Anne.*

(*b*) The caſes quoted for the plaintiff in error were, 1. Vent. 260. 2. Vent. 73. 174. 262. Cro. Jac. 272. and the caſe of Braddock *v.* Wilſon two years ago. —NOTE *to the former edition.*

(*c*) 3. Lev. 336. 1. Roll. Abr. 577. Stiles, 296.

Caſe 96. The Queen *againſt* Nun.

If a perſon under an examination before juſtices of the peace ſay,

THIS was an indictment found before the juſtices of peace, at the ſeſſions, for theſe words ſpoken of juſtices of the peace by *Nun*, at ſuch time as he was, by warrant, brought before them: "This is no juſtice's buſineſs; you ſhall not try this matter; have a care what you do; I have "blood in me, if I had you in another place;" it is not an indictable offence; for the words do not amount to *a challenge.*—S. C. Gilb. 36.

"This

" This is no juſtice of peace's buſineſs; you ſhall not try this " matter; have a care what you do, I have blood in me, if I had " you in another place: and upon *not guilty* pleaded, the defendant was found *guilty*. THE QUEEN *againſt* NUN.

IT WAS MOVED *in arreſt of judgment*, that theſe words are not indictable. In the caſe of *The Queen v. Langley (a)* it was reſolved, that words are not indictable, unleſs they have a direct and immediate tendency, and not by conſtruction and implication, to the breach of the peace. In the caſe of *The Queen v. Wrightſon (b)*, calling a juſtice of peace " aſs, fool, and coxcomb, for " making ſuch a warrant," was held not indictable. In the caſe of *The Queen v. Soley (c)*, ſaying of a juſtice of peace, " that he * [187] " would judge in any cauſe brought before him according to his " affection," was held not indictable. In the caſe of *The Queen v. Lyeaſſel (d)*, ſaying of a juſtice of peace, " he deſerved to be " hanged for making ſuch a numſkull order," was held not indictable. In the caſe of *Tuberville v. Savage (e)*, the defendant, laying his hand upon his ſword, ſaid, " If it were not aſſize-time, I would not " take ſuch language from you;" and held no aſſault.—It was likewiſe inſiſted upon, that if theſe words were indictable, yet they were not indictable before juſtices of the peace, but *oyer* and *terminer*.

ON THE OTHER SIDE, *to maintain the indictment*, the caſe of *Lord Darcy*, in THE STAR-CHAMBER *(f)*, was quoted, where, " You " lie, and I will maintain it with my life," were held words finable; and that this was a caſe in the Star-chamber is no objection to its authority, becauſe whatever authority that court exerciſed lawfully, the ſame may this Court. It was likewiſe ſaid, that the preſent caſe differed from all thoſe cited in this, that though they were words ſpoken of juſtices of the peace, yet it was of juſtices when abſent; whereas here the juſtices were preſent, and preſiding at the ſeſſions.

THE COURT inclined to the opinion, that the words are not indictable, as laid in this indictment, becauſe they did not carry any neceſſary intendment of *a challenge* or intent to break the peace, as in *Lord Darcy's Caſe* the words do; eſpecially when it appears, in this very indictment, that this *Nun* was a wheelwright, and ſo not likely to challenge or be challenged *(g)*.

(*a*) 9. Mod. 126. 2. Salk. 697. 3. Salk. 190.—See alſo 2. Roll. Abr. 78.

(*b*) Eaſter Term, 7. *Anne*. 2. Salk. 698.

(*c*) Mich. Term, 4. *Anne*.

(*d*) Hilary Term, 1712.

(*e*) 1. Mod. 3.

(*f*) Hob. 120.

(*g*) It is ſaid, S. C. Gilb. 40. that the judgment was arreſted, and, as it ſeems, on two grounds: FIRST, Becauſe the words could not, from the condition of the ſpeaker, be underſtood as *a challenge*; and SECONDLY, Becauſe the indictment did not ſtate that the charge on which *Nun* was before the juſtices, and in alluſion to which he ſpoke the words, was a matter within their juriſdiction; for if it were not, it could be no crime to ſpeak, in the language of the indictment, " *in* " *deprivation of their authority*." Gilb. 39.

The

Case 97.

* The Queen *against* Stafford.

Outlawry for high treaſon may be reverſed for a wrong *addition*, which is an error in fact, and may be confeſſed.

STAFFORD had been outlawed for high-treaſon, and had obtained, from THE CROWN, a writ of error to reverſe this outlawry.

The ATTORNEY-GENERAL had orders to confeſs in court the error aſſigned, which was an error in fact, *viz.* that he was outlawed by a wrong addition; which the ATTORNEY-GENERAL did accordingly.

The Court was therefore prayed, that the outlawry might be reverſed.

On reverſing an outlawry for *high treaſon*, there is no neceſſity to *warn the lords*, or to iſſue a *ſcire facias* to the *terre-tenants*.

But PARKER, *Chief Juſtice*, was of opinion, that though in outlawry for *treaſon* there is no need of warning the lords, of whom the lands are held by a *ſcire facias* before the outlawry be reverſed, as muſt be done in caſe of *felony*, becauſe in treaſon the forfeiture is to the crown, yet he ſaw no reaſon to diſtinguiſh between outlawry for felony and outlawry for treaſon, as to the *terre-tenants*; for in caſe of treaſon, where the forfeiture is to the crown, the crown may grant theſe lands to others, who ought to be heard what they can ſay for themſelves before they loſe their lands. He thought, therefore, there ſhould have been a *ſcire facias* to the *terre-tenants*; and grounded himſelf pretty much upon a caſe in the time of *Henry the Fourth* (*a*), where there was a *ſcire facias* to the *terre-tenant*; and though this was an outlawry for felony, yet the king's being immediate lord made it all one as if it had been an outlawry for treaſon. And the entry in caſe of felony, as may be ſeen *Coke's Entries* (*b*), mentions the ſuing out of a *ſcire facias* as a thing of abſolute neceſſity, without which the Judge could not reverſe the outlawry.

S. C. Gilb. 46.

But upon ſearching into precedents it was found, that in fact, in outlawry for treaſon there uſed to be no *ſcire facias*; and the precedents being ſo, and it being * a ſuppoſition, not of neceſſity, that THE CROWN ſhould grant theſe lands, and then out the patentees, by ſuffering a writ of error to be brought, the outlawry was reverſed.

* [189]

(*a*) Year-Book . *Hen.* 4. pl. . (*b*) Co. Ent. 318.

Caſe 98.

Turner *against* Goodwin.

To debt on bond conditioned to pay ſo much money, for which the obligee had recovered judgment againſt *A.* upon conſideration that the obligor would forbear to ſue out execution againſt *A.* and aſſign over the judgment; if the defendant plead, that the obligee had not aſſigned, the plaintiff may reply, that he was ready to aſſign the judgment; for the aſſignment is not a *condition precedent*. S. C. ante, 154. S. C. poſt. 222. S. C. Gilb. 40. S. C. Fort. 145.

THIS CASE had been argued laſt *Eaſter Term*, and came now to be ſpoken to again.

It was an action of debt upon a bond, conditioned for the payment of ſo much money, the plaintiff aſſigning over to the defendant ſuch a judgment againſt *D.*

PRATT,

TURNER *againſt* GOODWIN.

PRATT, *Serjeant, for the defendant*, inſiſted, that the aſſigning was a condition precedent to the payment. It was ſaid, that in the obligation there were very proper and ſignificant words to make a condition, either precedent or ſubſequent; that therefore it ſhould be taken either one way or the other, as would beſt anſwer the intention of the parties. Now the intention of the parties undoubtedly was, that the plaintiff ſhould have the money, and the defendant the judgment. But this intention could never be ſupported, by taking it to be a condition ſubſequent; for the money being once paid cannot be brought back again, in caſe the judgment ſhould not be aſſigned over. The law lays ſuch a ſtreſs upon ſupporting the intention of the parties, that it will interpret words not at all proper to amount to a condition, rather than the intention of the parties ſhould be violated; as the common caſe in *Co. Lit.* 24. of the grant of an annuity *pro concilio impendendo.* It cannot be objected, that the defendant ought to have concurred in doing this act, and requeſted the plaintiff to aſſign, &c. becauſe this was an act that it was in the power of the plaintiff to perform alone; for the judgment would, immediately upon the aſſignment, veſt * [190] * in the defendant before his acceptance of it *(a)*.

SERJEANT CHESSHYRE *for the plaintiff* inſiſted, that the defendant was bound to do the firſt act, *viz.* to offer to pay the money, though he acknowledged that the payment of the money and aſſignment of the judgment were to be concomitant acts in the execution. He relied much upon the replication of the plaintiff, which, the defendant having demurred to it, muſt be admitted as true. In this replication the plaintiff ſays, that he was ready to aſſign, &c. and requeſted the defendant to pay the money, which the defendant refuſed. This refuſal THE SERJEANT inſiſted to be an abſolute refuſal, and not a conditional one, *viz.* unleſs the judgment was aſſigned. And this abſolute refuſal of the defendant to pay the money he inſiſted upon to be a ſufficient diſcharge to the plaintiff from preparing the aſſignment. He referred to the caſe of *Thorpe v. Thorpe* *(b)*, where moſt of this ſort of learning is ſtated.

Adjournatur *(c)*.

(*a*) The caſes quoted in the argument for the defendant were, Spring *v.* Cæſar, 1. Saund. 320. 1. Jones, 189. Edwards *v.* Hammond, 3. Lev. 192. Grey's Caſe, Cro. Car. 433. 5. Co. 78. Large *v.* Cheſhire, 1. Vent. ; and the caſe of Butler *v.* Baker, 1. And. 348. Poph. 87.—NOTE *to the former edition.*

(*b*) 1. Lutw. 245.

(*c*) This caſe was argued again in Eaſter Term, 13. *Anne*; and in the Term following, judgment was given for the plaintiff. S. C. poſt. 222.

Seſtern *againſt* Cibber. Caſe 99.

In an action of debt by the aſſignee of a bail-bond,

THIS was an action of debt upon a bond brought by the plaintiff as aſſignee of a bail-bond.

it is fatal, on demurrer, to omit ſetting forth the *return of the writ* —S. C. Gilb. 77.

Sexteen *againſt* Cibber.

Upon demurrer, theſe objections were taken to the declaration:

FIRST, That the breach of the condition was ſet forth to be, his not appearing *ſecundum exigentiam brevis, et ſecundum formam brevis*; whereas it ought to have been, his not appearing at the return of the writ (*a*).

* [191] * SECONDLY, It was objected, that the very foundation of the action, *viz.* the breach, was ſet forth by way of recital, *cumque etiam non apparuit*; which ought to have been expreſsly averred, that ſo the defendant might have the liberty of traverſing it (*b*).

THIRDLY, It is not ſet forth upon what day the writ was returnable; and then *non conſtat* whether he did or did not appear *ſecundum exigentiam brevis*; whether the bond was, or was not forfeited.

EYRE, *Juſtice.* This caſe differs very much from the caſe of a ſheriff ſuing this bond himſelf; for there he has nothing to do but to declare upon the bond: but where the action is brought by the aſſignee, there it is the forfeiture that gives the action, which here is the non-appearance, and is a matter traverſable, and muſt not be ſet forth by way of recital, but muſt be poſitively averred. It is true, that the declaring in an *indebitatus aſſumpſit* is *cumque etiam* he was indebted: ſo in a bond, *quod cum per quoddam ſcriptum ſuum obligator.* But then in the firſt caſe it is the promiſe, and in the ſecond the breach of the condition, which gives the action; both which are ever poſitively averred, and not ſet forth by way of recital.

PARKER, *Chief Juſtice.* It is not true that there is no traverſing what is only ſet forth by way of recital; for the pleas of "*non* "*aſſumpſit*" and "*non eſt factum*" are both of them pleas that traverſe matters in thoſe reſpective actions that are pleaded by way of recital.

The return of the writ not being ſet forth is a fatal objection (*c*).

Adjournatur.

(*a*) 1. Lev. 145. 3 Lev. 243.
(*b*) Cro. Eliz. 441. 2. Jones, 197. 2. Lev. 206.
(*c*) See the caſe of Norton v. Syms, Hob. 12.; and Turner's Caſe, 8. Co. 132.—NOTE *to former edition.*

* [192]

Caſe 100.

* Johnſon *againſt* Altham.

Writ of error upon action upon the caſe.

THIS was a writ of error out of the court of common pleas in an action upon the caſe.

IT WAS INSISTED *for the plaintiff in error*, that there ſhould have been no final judgment, but a *reſpondeas ouſter.*

8. C. poſt. 210.

BUT IT WAS INSISTED *by the defendant in error*, that it was the concluſion of a plea that made it either a plea in bar or a plea in abatement,

abatement, be the matter of that plea what it will; and that here the plea was concluded with a *petit judicium de narratione*, which is always the concluſion of a plea in bar; and therefore a final judgment was rightly given.

JOHNSON *againſt* ALTHAM.

THE COURT. It is true, that it is the concluſion of a plea, be the matter what it will, that makes a plea a plea either in bar or in abatement. It is true likewiſe, that *petit judicium de narratione* is generally the concluſion of a plea in bar; for where there is either a writ or a bill, the demanding judgment of the declaration is a confeſſion that the writ or bill is good: but the difficulty in this caſe ariſes from hence, that here is no writ or bill, but the declaration is the firſt ſtep.

Adjournatur (a).

(a) The judgment of the court of common pleas was affirmed; poſt. 210.

The Queen *againſt* Muſcot.

Caſe 101.

A witneſs produced on the part of the crown on an indictment for perjury may be examined on the *voir dire* as to the degree of *intereſt* he has in the proſecution.

A QUESTION was ſtarted in an indictment for a judicial perjury, Whether one produced as an evidence for *the queen* might not be examined upon a *voir dire*, as the common uſage is in civil actions?

IT WAS INSISTED, *by the Counſel for* THE QUEEN, that the queſtion ſhould not be put, becauſe the conſequence would * be, that no ſuch proſecutions could ever go on; for there is ſcarcely any proſecutor but if aſked whether he be intereſted in the event of a cauſe, muſt ſay he is. For example: Where the owner proſecutes an indictment of felony for ſtolen goods he is concerned in intereſt, for he will be intitled to reſtitution, and yet his evidence is admitted. So likewiſe, where an indictment is removed by *certiorari* from the ſeſſions into the court of king's bench, notwithſtanding the proſecutor in that caſe, if the defendant be convicted, is, by the ſtatute of 5. & 6. *Will. & Mary*, c. 11. intitled to his coſts, yet he is allowed as a witneſs. So likewiſe there are ſeveral caſes where, though a man will, in caſe of conviction, be intitled to forty pounds, yet his evidence ſhall be received. And as to the caſes of *The Queen v. Duke of Leeds (a)*, and *The Queen v. Cobham (b)*, where the informer was refuſed to be an evidence, there is this difference between thoſe and the preſent caſe, that there it appeared upon the face of the record that the parties produced as witneſſes were intereſted. In hue and cry, the evidence of the perſon robbed is always allowed as evidence.

* [193]

PARKER, *Chief Juſtice.* It is a principle of the common law, that every man ſhall be tried by a fair jury, and that evidence ſhall be given by perſons diſintereſted. The law gives the party tried his election to prove a perſon offered as evidence intereſted two ways, *viz.* either by bringing other evidence to prove it, or elſe

(a) (b)

THE QUEEN *againſt* MUSCOT.

by ſwearing the perſon himſelf upon a *voir dire*; but though he may do either, he cannot have recourſe to both. It was never objected before, that a perſon ſhould not be ſworn upon a *voir dire*; nor will it, I hope, ever hereafter. Objections have indeed been ſtarted as to the nature of thoſe queſtions, that ſhall be put to a witneſs upon taking ſuch an oath. As to the caſe of robbery, that is founded upon the neceſſity of it, and that only. * As to the caſes put upon the ſtatutes where forty pounds reward, &c. they admit of this anſwer, that the intention of thoſe acts will be quite defeated, if the reward were to take off their evidence. The ſame anſwer likewiſe may ſerve to the caſes put upon an indictment of felony for ſtolen goods, and where the indictment is removed by *certiorari*, &c.; for who, in the firſt caſe, but the owner can prove the property of the goods? and in the ſecond, if the giving of coſts ſhould take off the evidence of the proſecutor, that act of parliament, which was deſigned to diſcountenance the removing of ſuits by *certiorari*, would give the greateſt encouragement to them that is poſſible. As for the diſtinction taken between the intereſt of the witneſs appearing upon record, and its appearing ſome other way, it is an irrational diſtinction, and a reflection upon the wiſdom of the law. As to the objection taken from the inconvenience of putting the general and common queſtion, becauſe probably he muſt anſwer it in the affirmative, there is nothing in it, for he may be aſked to explain the nature of his intereſt, that ſo the Court may be judge, whether his intereſt is ſuch as ought to exclude his evidence.

* [194]

He was accordingly ſworn upon a *voir dire*.

To convict a perſon of perjury, one witneſs is not ſufficient to prove the falſity of the fact ſworn.

PARKER, *Chief Juſtice*, in ſumming up the evidence, ſaid, *inter alia*, There is this difference between a proſecution for perjury and a bare conteſt about property, that in the latter caſe the matter ſtands indifferent; and therefore a credible and probable witneſs ſhall turn the ſcale in favour of either party; but in the former, preſumption is ever to be made in favour of innocence; and the oath of the party will have a regard paid to it, until diſproved. Therefore to convict a man of perjury, a probable, a credible witneſs is not enough; but it muſt be a ſtrong and clear evidence, and more numerous * than the evidence given for the defendant; for elſe there is only oath againſt oath.

* [195]

Perjury cannot be aſſigned on a mere *miſtake* of a fact.

SECONDLY, A miſtake is not enough to convict a man of perjury; the oath muſt be not only falſe, but wilful and malicious. I remember a caſe ruled by my predeceſſor, where a perſon ſwore, that he ſaw and read ſuch a deed, and it proved upon the trial to be only the counterpart which he ſaw; and yet held no perjury, becauſe only a miſtake.

If a witneſs ſwear falſely and maliciouſly to a *circumſtance* material to the iſſue, he may be indicted for *perjury*.—Salk. 513.

THIRDLY, It is my opinion, that perjury may be committed in a circumſtantial matter, though I do not remember that, in fact,

it

it was ever carried ſo far. I have heard a caſe mentioned in *King William*'s time, where the queſtion being put about the ſealing of a deed, it was ſworn that the party was, at ſuch a time, in ſuch a place, and conſequently could not ſeal the deed; and upon this oath he was convicted of perjury. But now, though the matter of this oath was but a circumſtance, conſidered in relation to the point in queſtion, upon the trial in which the oath was given, yet it was all his oath, his entire evidence. But if perjury may be committed in matter of circumſtance, it muſt be a material circumſtance; a circumſtance of that weight, that without it he could not hope to find credit with the jury.

THE QUEEN *againſt* MUSCOT.

HILARY TERM,

The Twelfth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir Thomas Powys, *Knt.*
} *Juſtices.*

Sir Edward Northey, *Knt. Attorney General.*

Sir Robert Raymond, *Knt. Solicitor General.*

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* Harriſon *againſt* Thornborough. Caſe 102.

THIS was an action for theſe words: "*Harriſon* got a witneſs to forſwear himſelf in ſuch a cauſe; you or he (*innuendo* the plaintiff) hired one *Bell* to forſwear himſelf:" and for theſe following words, ſpoken at another time: "Two dyers are gone off (*innuendo* become bankrupt), and for aught I know *Harriſon* will be ſo too within this time twelvemonth:" a verdict for the plaintiff, and joint damages were given.

A declaration in ſlander, "*A.* got "a witneſs to "forſwear "himſelf in "ſuch a cauſe; "you or he, (*innuendo* the "plaintiff, hired one *B.* "to forſwear "himſelf— and "Two "dyers are "gone off "(*innuendo* "become "bankrupt), "and for aught "I know *A.* "will be ſo "too," is good.

IT WAS MOVED *in arreſt of judgment*, that the words are not actionable; for though the firſt branch of the words, if they were alone, are certain enough, yet when he goes on and ſays, "You, "or the plaintiff, hired one *Bell* to forſwear himſelf," it becomes altogether uncertain to whom the words relate; and to this purpoſe were cited 1. *Roll's Abr.* 81. and 1. *Cro.* 497. where the words were, "one of you three, &c."

SECONDLY, The declaration does not ſet forth, that what the witneſs * was forſworn in was a material point in the cauſe.

THIRDLY, Suppoſing the words are actionable, yet if the following words, that were ſpoken at a different time, are not action-

S. C. Gilb. 114. Hob. 268.

HARRISON *against* THORNBOROUGH.

able, then, the damages being joint, the judgment must be arrested.

FOURTHLY, Those words are not actionable, because the words "gone off" are capable of various constructions, and were therefore to be taken in the most favourable sense. In the case of *Chapman v. Lampire* (*a*), the words were, "He is broken, run "away, and will never return again;" and the Court were divided (*b*).

Salk. 513.

FIFTHLY, If the words themselves are not actionable, the *innuendo* will not help it; for an *innuendo* is not to set forth new matter, but to refer to something already mentioned in the declaration. In the case of *King v. Greep*, the word "*Newnham*," INNUENDO "*Newnham*, in *Devonshire*;" and in 4. *Co.* 20. a. "burnt my barn," *innuendo* "full of corn;" the *innuendoes* were held void, because they set forth new matter.

SIXTHLY, That the action would not lie, unless *Bell* had actually forsworn himself; which perhaps the words "got, &c." do not necessarily imply.

THE COURT was of opinion, that the plaintiff should have judgment. Precedents in actions for words are not of equal authority as in other actions, because *norma loquendi* is the rule for the interpretation of words; and this rule is different in one age from what it is in another. The words which an hundred years ago did not import a slanderous sense now may; and so *vice versa*. In this kind of action for words, which are not of very great antiquity, the Courts did at first, as much as they could, discountenance them; and that for a wise reason, because generally brought for contention and vexation; and therefore when the words were capable of two constructions, the Court always took them *mitiori sensu*. * But latterly these actions have been more discountenanced; for men's tongues growing more virulent, and irreparable damage arising from words, it has been by experience found, that unless men can get satisfaction by law, they will be apt to take it themselves. The rule therefore that has now prevailed is, that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them. The words "you or he, &c." do not render the former uncertain; for they relate not to the "getting, &c." but to new matter, *viz.* who paid the money. Besides, if the words were, "*A.* or *D.* did, "&c." either *A.* or *D.* might bring an action; but then there must be an averment, that neither of them did it.

Hob. 268. 4. Co. 20. 3. Cro. 277.

* [198]

It is not necessary to the maintaining of this action, that *Bell* did forswear himself.

The signification of the words "gone off" are very well known among merchants,

(*a*) 3. Mod. 155.

(*b*) The plaintiff's Counsel, in answer to the uncertainty of the words, quoted the following authorities: Latch 219. 2. Keb. 718. Stiles, 142. Cro. Jac. 407. Raym. 217. 1. Lev. 277. 1. Cro. 236. Dyer, 72.

The

The doctrine laid down concerning *innuendo's* is undoubtedly true, when underſtood of matters of fact; but here the *innuendo's* are not introductory of new matters of fact, but only explanatory of the foregoing words.

HARRISON *againſt* THORNBOROUGH.

Hob. 2, 3. 6. 45.

JUDGMENT was given for the plaintiff.

* [199]

The Queen *againſt* Delme. Caſe 103.

In an information *quo warranto* againſt an alderman, *the array* may be challenged, if returned by an *alderman* or a *freeman*.

THIS was an information againſt *Delme*, for exerciſing the office of alderman in the city of *London*, not being duly choſen.

THE COUNSEL *for the Queen* challenged THE ARRAY, becauſe * one of the ſheriffs was one of thoſe returned to the court of aldermen.

Salk. 152. Hob. 235.

This challenge being allowed, a *venire facias* was directed to the other ſheriff.

THE COUNSEL *for the defendant* challenged THE ARRAY, becauſe returned by a ſheriff that was concerned in intereſt, as he was a freeman of the city of *London*.

Upon this a *venire* was directed to the coroner.

On an information *quo warranto*, *quære*, whether the crown can change the *venue*, on a ſuggeſtion of probable partiality, after having challenged *the array*, and a new *venire* has iſſued.

THE COUNSEL *for the Queen*, before any return, entered a ſuggeſtion upon record, ſetting forth, that the queſtion to be decided upon this trial being, whether the right of election was in the freemen only, or in all thoſe who paid ſcot and lot (freemen or no freemen), it appeared, from the nature of the thing, that it was impoſſible for an impartial jury to come out of *London*, and therefore they prayed a *venire* to the ſheriff of *Surrey*, the adjacent county.

IT WAS NOW MOVED *to ſet aſide this ſuggeſtion*, as being out of time, and inconſiſtent with what they had before admitted upon record. For it was inſiſted, that this ſuggeſtion containing no new matter ariſing ſubſequent to, or not known at the time when, upon the allowance of the challenge to the array, for the partiality of one ſheriff, the *venire* was prayed to the other and granted, it was now too late to make it. But what was moſt ſtrongly urged was, that the Counſel for the queen, by challenging the array, and praying a *venire* to the other ſheriff of *London*, had thereby admitted upon record that an impartial jury might come out of *London*; and therefore they ſhould not now, in diſ-affirmance of what they had before admitted, be allowed to make this ſuggeſtion. It was ſaid, that theſe ſuggeſtions were in their nature odious, as tending to put things out of the uſual courſe of law. Theſe ſuggeſtions being in the nature of challenges, whatever caſes would prove ſuch ſort of challenges unlawful, * muſt, by parity of reaſon, prove the illegality of the ſuggeſtion (*a*).

* [200]

(*a*) Caſes quoted were, 22. *Edw.* 4. f. 3. pl. 11. Cro. Jac. 35, 36. 15. *Hen.* 7. f. Robinſon's Entries, pa. 144. Moore, 894. 4. *Edw.* 4. 6. Dyer, 25. 2. Rolle, 637. Earl of Kent's Caſe, 2. Rolle, 643.

In

THE QUEEN *againſt* DELME.

In the following Term

IT WAS INSISTED, *in favour of the ſuggeſtion*, that the defendant, by his challenge to THE ARRAY, had deſtroyed whatever admiſſion upon record the ſuing out the *venire* to the other ſheriff might amount to. For the ſake of having trials fair, and to prevent delay of juſtice, challenges are favoured in law; hence it is allowed by law to make ſeveral challenges at the ſame time *(a)*. Though a challenge be *in eſſe* at the time of the former, yet if the party had not, by reaſonable intendment, notice of the cauſe of challenge, he is not eſtopped. Now this ſuggeſtion depends entirely upon the knowledge of the cuſtoms of the city of *London*, which cuſtoms the crown is a ſtranger to. Beſides, there is no arguing from proceedings at law between ſubjects to ſuits where the crown is party, becauſe the crown has ſeveral privileges above a ſubject; as the crown may waive their demurrer, take iſſue, and waive that iſſue *(b)*. The crown may change their own *venue* *(c)*. The queen may amend her pleadings at any time; nor will any *eſtoppel* bind the crown *(d)*.

Adjournatur *(e)*.

(a) Co. Lit. 158.
(b) Vaughan, 65.
(c) Dyer, 55. 1. Vent. 17.
(d) Hob. 339. 1. Sid. 412.
(e)

Caſe 104.

Abrahat *againſt* Brandon.

A releaſe awarded to be made to the time of the award, is good; for it is not to be intended that any new difference has ariſen between the time of the ſubmiſſion and of the award.

THE ARBITRATORS, taking notice of the difference between the parties, award, that the defendant ſhall pay to the plaintiff ſo much money upon the firſt of *April*, ſo much upon the firſt of *May*; and that the parties ſhall pay one pound five ſhillings each to the arbitrators for the trouble; and that upon payment *prædict.* * *monet.* upon the firſt of *May*, the parties ſhould give mutual releaſes to the time of the making the award.

IT WAS OBJECTED to this award, that it was made *ex parte tantùm*; for nothing was awarded in favour of the defendant but the releaſe, which the defendant had no remedy for at law; for the plaintiff was not by the award bound to make the releaſe until after payment *monet. prædict.* upon the firſt of *May*. Now *monet. prædict.* refers not only to the ſums awarded to be paid upon the firſt of *May*, but all the ſums, and therefore to the ſum awarded to be paid to the arbitrators, which part of the award is entirely void.

A releaſe of all, &c. to the time of the ſubmiſſion is a good performance of an award, ordering a releaſe to be given of all, &c. to the time of the award, for that part of the releaſe which extends to the intermediate time out of the power of the arbitrators.—S. C. Gilb. 118. Hob. 49. 50.

SECONDLY, That the releaſe awarded by the arbitrators is a releaſe exceeding their power, which extends only to the time of ſubmiſſion; whereas the releaſe, according to the award, extends to the time of the award made.

THE

THE COURT was of opinion, that the award was good; for *monet. prædict.* ſhall refer to all the ſums that concern the juſtice of the award, but not that ſum which does not, and as to which the award is void. ABRAHAM *againſt* BRANDON.

And as to THE SECOND OBJECTION, it is capable of two anſwers; one a common one, *viz.* that it ſhall not be intended that any new difference has ariſen between the time of the ſubmiſſion, and of the award, unleſs it be ſhewn eſpecially that there has. The other anſwer is, that a releaſe of "all, &c." to the time of the ſubmiſſion, is a good performance of an award, ordering a releaſe to be given "of all, &c." to the time of the award. Salk. 74. Salk. 75.

PARKER, *Chief Juſtice*, ſaid, he took down this from *Chief Juſtice* HOLT's own mouth, in the caſe of *Freeman v. Bernard* (*a*).

THE COUNSEL likewiſe quoted *Lutw.* 524. 549. to the ſame purpoſe. The reaſon is plain, becauſe that part of * the releaſe which extends to the intermediate time exceeds the power of the arbitrators. * [202]

Judgment was given for the plaintiff.

(*a*) Salk. 69.

The Queen *againſt* The Corporation of Helſton, in Cornwall. Caſe 105.

THE QUESTION was, Whether, if upon a trial, a point in law be ſtarted by the Judge, and the Counſel do not take it up, but inſiſt upon other facts, which are found againſt them, whereas, had the Counſel inſiſted upon the matter of law ſtirred by the Judge, the verdict muſt have paſſed for them, this is ſufficient cauſe to move for a new trial?

A point of law ſuggeſted by the Court on a trial, if rejected by the Counſel in whoſe favour it would have then prevailed, is not a ground on which the Court will grant a new trial.

PARKER, *Chief Juſtice*. The granting of new trials is of late original; it began about the year 1652, when the firſt new trial was granted for exceſſive damages. Experience ſhews that they are grantable, as well for a fault in the Judge as for a fault in the jury, in cauſes tried at *niſi prius*; becauſe a Judge of *niſi prius* acts rather in a miniſterial than in a judicial capacity; and the ground and foundation of granting new trials, when either the Judge or the jury are to blame, is one and the ſame, *viz.* doing juſtice to the party. The queſtion in this caſe I take to be this, Whether we are ſo bound down by forms of law, as that though we ſee a verdict given contrary to a point of law (which the Judge himſelf took notice of, and yet, for want of the Counſel's doing their duty to their client, was not inſiſted upon), we cannot grant a new trial? When a point of law ariſes, whether the Counſel inſiſt, or do not inſiſt upon it, the Judge is bound to direct the jury accordingly. But yet, if the ſupporting of this verdict be of no more ill conſequence than in point of coſts, and the party has another remedy left him, then I am of opinion, Salk. 649. 653. 1. Wilſ. 98. 1. Term Rep. 84. 5. Term Rep. 7.

that

THE QUEEN *againſt* THE CORPORATION OF HELSTON, IN CORNWALL.

that the party ought to ſuffer for the neglect of his * Counſel. But if the verdict binds and concludes the right of the party, then I think it hard that the party ſhould loſe his right by a miſtake or ſlip of the Counſel.

POWYS *ſenior.* It would be of vaſt inconvenience if the bare ſtirring of a point at *niſi prius*, and which, for aught appears, neither the Judge, the Counſel, or the jury, thought upon more, ſhould be a ground for granting a new trial; for it may be, the reaſon why it was not inſiſted upon by the Counſel was, becauſe they knew the other ſide had evidence that would give it a full anſwer, by quite altering the fact. What happens now accidentally may hereafter happen deſignedly; matter may be ſlided in by the Counſel, and then dropped, only in order to move for a new trial; and it is better to ſuffer a particular inconvenience, than to open the way to a general miſchief.

EYRE, *Juſtice.* The miſtake of the Judge or jury is a good cauſe of granting a new trial; but I never yet heard, that the miſtake of the Counſel was ſo. The Counſel ſtands in the place of his client; and therefore, if the Counſel waive a point, it is the ſame as if the client did it himſelf.

POWYS *junior.* If, in an action of debt upon a bond, a defendant, who has a good defence upon the merits, ſhould, by advice of Counſel, hazard his cauſe upon a demurrer, which is adjudged againſt him, this miſtake of Counſel would not be allowed in chancery as a good cauſe of relief.

PARKER, *Chief Juſtice.* There muſt be no new trial. And I ſo far aſſent to my Brothers, that though a verdict ſhould leave the party remedileſs, yet if the Counſel do not only not inſiſt, but expreſsly waive it, that then there ought to be no new trial.

* [204]

Caſe 106.

* Barnardiſton *againſt* Fowler.

An award made on the 23 *June*, ordering one of the parties to pay ſo much for rent that will become due on the 24 *June*, is void.

S. C. Gilb. 125. Kyd on Awards,

PARKER, *Chief Juſtice*, delivered the reſolution of the Court, The points in this caſe are two: FIRST, Whether the award be a good award? and, SECONDLY, Whether the breach be well aſſigned?

AS TO THE FIRST we are of opinion, that the award is a void award, though it was not inſiſted upon by the Counſel; and that for this reaſon: The award was made the twenty-third day of *June*, and the award orders ſo much rent, which by the award itſelf appeared not to be due until the twenty-fourth, to be paid by *A.* to *B.* in ſatisfaction of ſix pounds which the arbitrators adjudged to be owing to *B.* Now this rent being due upon a day ſubſequent to the award, the clauſe in the award concerning it was void, 1. *Roll. Abr.* 145. *pl.* 8. is an expreſs authority; and the reaſon is plain, *viz.* becauſe the rent may become extinct, either by ſurrender or eviction, before it is due. And this clauſe being

void,

void, the whole award becomes void too; for though an award may be void in part, and good for the reſt, yet this muſt not be when it is void in that part that concerns the juſtice of the award, which is the caſe here; for if mutual releaſes are to be given, though the rent be not paid according to the award, *B.* will be without remedy for that money which the arbitrators acknowledge to be due to him. *Saunders*, 292. *Cro. Jac.* 584.

BARNARDISTON *againſt* FOULYER.

Ante, 201.

But, SECONDLY, ſuppoſing this to be a good award, we are of opinion, that the breach is not well aſſigned; for the ſubmiſſion being of "all ſuits, &c. between *A.* and *B.*" and the award purſuing the very words of the ſubmiſſion, *viz.* "that all ſuits, &c. "between *A.* and *B.* ſhould ceaſe," * it is evident that neither the parties to the award, nor the arbitrators, deſigned the former that their ſubmiſſion, or the latter that their award, ſhould extend to ſuits depending between *A.* and *B.* and others. But be the intention of the parties what it will, the law is plain, that the proſecution of a ſuit between *A.* and *B.* and others, is no breach of ſuch an award. The caſe of *Brockas v. Sir John Savage* (*a*) is a much ſtronger caſe; becauſe huſband and wife are, to many purpoſes in law, conſidered as one perſon. If a *certiorari* iſſue to return the record of a ſuit between *A.* and *B.* and the return is of a record between *A.* and *B.* and *C.* the record is not removed.

Breach of an award not well aſſigned.

* [205]

In *Michaelmas Term*, in the twelfth year of *William the Third*, this was held in *Brown's Caſe*, on an indictment in this court; and the caſe is the ſame as to orders.

Salk. 145.

JUDGMENT was given for the defendant (*b*).

(*a*) 1. Roll. Abr. 246.

(*b*) Caſes quoted *arguendo*, 2. Mod. 227. Green *v.* Stanford. 2. *Rich.* 3. 18. 1. Rolle's Abr. 261. 2. Rolle's Abr. 412. 20. *Hen.* 6. 41. Gle *v.* Rell, 1704. affirmed in the houſe of lords.—NOTE *to the former edition.*

* [206]

Aubry *againſt* Forteſcue.

Caſe 107.

THE PLAINTIFF declared, that the defendant being indebted to the plaintiff *pro opere et labore*, &c. promiſed him, on the firſt of *April*, to pay him the money upon the firſt of *May*, &c.

To an *aſſumpſit* brought on a promiſe to pay 1ſt *May*, the defendant pleads the ſtatute of Limitations.

The defendant pleaded the ſtatute 21. *Jac.* 1. c. 16. in bar, *non aſſumpſit infra ſex annos.*

Quære, If a replication ſtating that he was beyond ſea when the cauſe of action accrued, and that the action was begun within ſix years after his return, be good.

The plaintiff replied, that he was beyond ſea at the time the action accrued, and that the action was begun within ſix years *poſt reditum.*

The defendant demurred, and the plaintiff joined in demurrer.

FOR THE PLAINTIFF, *Turner's Caſe* (*a*) was quoted, that if the bar be bad in ſubſtance, and there is a replication only to avoid the bar, which replication is vicious, * and to this replication the defendant demurs, yet the plaintiff muſt have his judgment,

6. Com. Dig. "Temps" (G. 1)

(*a*) 8. Co. 132.

becauſe

AUBRY *againſt* FORTESCUE.

becauſe though the replication be naught, yet not being to enforce the cauſe of action, but to avoid the bar, which is bad in ſubſtance (for the bar ſhould have been *actio non accrevit*, and not *non aſſumpſit* (*a*)), it is no prejudice to the plaintiff.

What was moſt materially inſiſted upon *for the defendant* was, that the whole record was what the Court were to found their judgment upon; that therefore, if it appeared upon the whole record that the plaintiff had no cauſe of action, whether by reaſon of declaration, bar, replication, &c. (not material which), the plaintiff could never have judgment. And here the plaintiff, by his own replication, had quite deſtroyed his cauſe of action; for he admitted that he had not brought his action within ſix years after the cauſe of action accrued, but took ſanctuary in the ſaving clauſe of the ſtatute of Limitations. The queſtion therefore was, Whether the matter ſet forth in his replication brings him within the ſaving clauſe of the act? Actions of *aſſumpſit* are not mentioned in the ſaving clauſe; and conſequently it is plain, that the plaintiff is not intitled to the benefit of the ſaving, by the letter of it. And that the ſaving in the ſtatute of Limitations is not to be extended according to equity, the reſolution in *Bynion's Caſe* (*b*), that the ſhutting up of courts *tempore guerræ* does not likewiſe fall under the ſaving, a reſolution often approved of by *Chief Juſtice* HOLT, is an expreſs authority.

THE COURT was ſtrongly of opinion for the plaintiff.

Sed adjournatur.

(*a*) See Salkill *v.* Warman, ante 104. (*b*) Salk. 420.

*[207]

Caſe 108. *The Univerſity of Cambridge *againſt* The Archbiſhop of York;

OR,

Vavaſor *againſt* Crofts.

If a *quare impedit* be brought in the name of "The chancellor and ſcholars of *Cambridge*," according to a charter ſet forth, he defendant cannot, in a plea in bar, give them another name, without ſhewing a different charter.
S. C. Gilb. 248.
2. Stra. 816.
2. Ld. Ray. 1178. 1542.

THIS was a writ of error out of the court of common pleas, upon a *quare impedit* brought by the chancellor and ſcholars of the Univerſity of *Cambridge*, againſt *the Archbiſhop, &c.* founded upon the ſtatute of 3. *Jac.* 1. c. 5. which diſables popiſh recuſants convict from preſenting, &c. and veſts ſuch preſentations in the chancellor and ſcholars of the two univerſities reſpectively.

The queſtions upon this caſe were two:

FIRST, Whether the defendant's plea in abatement, *viz.* that the Univerſity of *Cambridge* were incorporated by the name of "chancellor, maſters, and ſcholars, &c." and that therefore they had ſued by a wrong name, was a good plea: for if ſo, the court of common pleas erred in awarding a *reſpondeas ouſter.*

IT WAS INSISTED *in behalf of plaintiff in error*, that it was a good plea in abatement; and for this purpoſe were cited the Year-

Year-Books 4. *Edw.* 4. 7. 22. *Edw.* 4. 34. and 13. *Hen.* 7. 14. name of a corporation compared to the name of baptiſm (*a*).

CHESSHYRE, *Serjeant*, *for defendant in error*, argued, that a corporation may have one name by which they may take, and another by which they may ſue (*b*); therefore *non ſequitur* that, becauſe the Univerſity was incorporated by this name, they cannot be impleaded, or ſue by another. He argued, that the act of parliament veſting this right in them, by the name of "chancellor "and ſcholars," was an incorporating of them by that name, *quoad* this particular * purpoſe. This, he ſaid, could be done by letters patent (*c*); *à fortiori* by act of parliament; and if this ſhould be ſo, then the very act of parliament is a falſification of the plea. A plea in abatement muſt be certain to every intent (*d*). It was ſaid likewiſe, that there was another rule as to pleas in abatement, *viz.* that the defendant muſt never ſet aſide the writ of the plaintiff, without ſhewing a better. He inſiſted, laſtly, that this variance was not a material one; becauſe a man by becoming maſter does not ceaſe to be a ſcholar.

* [208]

THE COUNSEL *for the plaintiff in error* replied, that if the caſe were really ſo, that the Univerſity of *Cambridge* had one name to take, and another to ſue by, that this ought to have been ſhewn by the other ſide; that the act of parliament operated only by way of *deſcriptio perſonæ*, as in a deviſe, and not by way of incorporating them; that admitting this ſtatute did incorporate them, as to this purpoſe, by the name, &c. yet the acceptance of a new charter by another name, made it neceſſary for them to ſue by that name.

PARKER, *Chief Juſtice*. The declaration ſets forth the act of parliament, as an authority to ſue by that name, which puts it upon the defendant to ſhew ſome ſpecial matter to avoid it, as the acceptance of another charter by another name ſubſequent to the act.

POWYS *ſenior*. "Chancellor and ſcholars" is ſuch a name as comprehends the whole Univerſity, for it includes both head and members.

EYRE, *Juſtice*, and POWYS *junior*. *Non ſequitur*, that what will be ſufficient to amount to a *deſcriptio perſonæ* to enable a perſon to take, will be ſufficient for him to ſue in.

* [209]

* THE SECOND QUESTION in this caſe was, that the univerſity of *Cambridge* had not ſufficiently pleaded the conviction for want of "*ideo convictus eſt.*"

The record of refuſing to make the declaration according to 3. *Jac.* 1. c. 5. is tantamount to a conviction.

BUT TO THIS *it was anſwered*, that the record of the default was a conviction of itſelf; and therefore the ſpecial concluſion of *ideo convictus eſt* is ſuperfluous and unneceſſary.

(*a*) Fitz. Abr. "Deviſe," pl. 27.
(*b*) 1. Roll. Abr. 513.
(*c*) Year-Book 2. *Hen.* 7. pl. 13.
and the caſe of the Dean and Chapter of Chriſt-Church *v.* Perrott, 4. Leon. 150.
(*d*) Co. Lit. 303. a.

And

VAVASOR *againſt* CROFTS.

And to this opinion THE COURT inclined.

This laſt queſtion depended upon ſtatute 1. *Will. & Mary*, ſeſſ. 1. c. 26.

Adjournatur.

Caſe 109.

Parker *againſt* Langly.

In an action upon the caſe for a malicious proſecution, the plaintiff, in his declaration, muſt ſhew what became of the malicious proſecution.

S. C. ante, 145.

S. C. Gilb. 163. Salk. 15.

PARKER, *Chief Juſtice*, delivered the reſolution of THE COURT to be, that the declaration was naught, for want of ſhewing what became of the former action; whereas it ought to have been ſhewn, that that was falſe and hopeleſs. As the declaration now ſtands, the firſt ſuit may either be determined, or it may be deſerted, or it may be ſtill going on; and *non conſtat* which of theſe three is the matter of fact. If the firſt, *non conſtat* whether determined for or againſt the plaintiff; if for the plaintiff, then there is no colour for this action. If the ſecond were the matter of fact, deſertion is an indication of its being falſe and hopeleſs, and then indeed this action would be maintainable: and for this purpoſe there is a very ſtrong caſe in *W. Jones*, 93. If the third be the matter of fact, then the action is brought too ſoon. In the reign of *Richard the Third* (*a*), it was held by all the Judges, that the firſt action muſt be firſt determined, becauſe "*non intelligitur*," ſays the book, "*quouſque terminetur* that the action was unjuſt (*b*)." No man can ſay of an action ſtill depending, that it is falſe or malicious. The ſame rule holds in criminal caſes (*c*). * In an action for a malicious indictment, the plaintiff muſt in his declaration ſhew what became of the indictment (*d*). A verdict, or a plea in bar admitting and confeſſing the firſt action to be falſe and hopeleſs, may cure this defect in a declaration (*e*). The admitting this declaration to be good notwithſtanding this omiſſion, would introduce great abſurdities, *viz.* inconſiſtent and incongruous verdicts in different actions. Indeed, if the firſt action go off by nonſuit, it may be ſaid, that in another action brought for the ſame cauſe, there may be a verdict given inconſiſtent with the verdict given in the preſent cauſe. This may be; but the poſſibility of ſuch a verdict in a future and not exiſting action ſhall not hinder a man from bringing ſuch an action as this. The entries (*f*) uphold this opinion.

* [210]

JUDGMENT was given for the defendant (*g*).

OBITER DICTUM by THE CHIEF JUSTICE in this reſolution, that where the title is of one ſort of action, there the declaration

(*a*) Year-Book 2. *Rich.* 3. pl. 9.
(*b*) Dyer, 284. Heb. 267.
(*c*) Yelv. 116. 1. Sid. 15. 1. Saund. 228. 2. Keb. 476.
(*d*)
(*e*) Raym, 418. 2. Keb. 456. 753. 3. Keb. 781.
(*f*) See Aſhton, 40. Brownlow Redivivus, 61. Robinſon, 91.
(*g*) See Fiſher *v.* Briſtow, Dougl. 205. Lewis *v.* Farrel, 1. Stra. 114. Morgan *v.* Hughes, 2. Term Rep, 225.

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can never change it to another; but it may make a fatal variance between the writ and the declaration. 1. *Ventris*, 19. 2. *Rolle's Rep.* 49. PARKER *againſt* LANGLY.

Johnſon *againſt* Altham. Caſe 110.

PARKER, *Chief Juſtice*, delivered the reſolution of THE COURT to be, that the judgment of the court of common pleas ſhould be affirmed. "*Petit judicium de billa*" is the form of pleading in abatement: * "*Petit judicium de narratione*" the form of pleading in bar. Demanding judgment of the declaration is underſtood to be demanding judgment of the caſe in the declaration. The demanding judgment of the bill is as much as to ſay, 'Since the declaration is your caſe, which it is always ſuppoſed to be, you have brought a wrong bill.' In this caſe, there being no bill upon the file, and the declaration being the very firſt ſtep in the cauſe (which undoubtedly is erroneous, for every cauſe muſt begin either by writ or by bill), neither of theſe two forms of pleading were proper: not "*petit judicium de billa*," for there was none; not "*judicium de narratione*," for it was not the caſe in the declaration, but the want of a bill, that was the error. The defendant, therefore, in the original action ſhould have concluded his plea thus: "*petit judicium ſi reſpondere compelli debeat.*"

Pleading.

S. C. ante, 192.

* [211]

The Queen *againſt* Blagden. Caſe 111.

THIS was AN INFORMATION, in nature of a *quo warranto*, againſt *Blagden*, the defendant, to know by what authority he exerciſed the office of *portreeve* in the borough of *Honiton*.

If *quo warranto* for exerciſing the office of *portreeve*, if the defendant ſet forth his right, and traverſe the uſurpation, a replication taking iſſue on the *uſurpation*, without noticing the *title*, is bad, S. C. poſt. 296.

The defendant in his bar ſet forth his right to that office; and concluded with a traverſe, ABSQUE HOC that the defendant uſurped the office.

The crown in its replication, taking no notice of the ſpecial title ſet forth by the defendant, joined iſſue upon the traverſe "*quòd uſurpavit, &c.*"

And upon this demurrer was joined.

POWYS *junior*. I ever took it, that in this caſe the ABSQUE HOC, &c. was but mere matter of form, and a reſpectful way of concluding the plea. S. C. Gilb. 6. 145.

*PARKER, *Chief Juſtice*. The queſtion turns upon this, Whether the traverſe be only matter of form? for if ſo, THE CROWN cannot take iſſue upon it; but if it be a material part of the plea, moſt certainly THE CROWN may do it.

* [212]

Adjournatur (*a*).

(*a*) This caſe was argued again in Eaſter Term, 1. *Geo.* 1. and judgment was given for the defendant. S. C. poſt. 299.

Case 112.

The Queen *against* Green.

Quære, If a penal ſtatute ſay, that proſecution ſhall be in ſo many days, whether they ſhall be incluſively or excluſively taken.

THE COURT was moved to quaſh a conviction upon the ſtatute 8. *Anne*, c. 18. againſt a baker, for ſelling of bread.

Exceptions were taken to the conviction.

THE FIRST EXCEPTION was, that it appears upon the conviction, that information was given the *eighth* day of an offence done upon the *fifth*, and the act of parliament requires the information to be given in *three days* after the offence committed.

PARKER, *Chief Juſtice*. It is not ſettled, whether the time in this act of parliament is to be taken incluſively or excluſively; for the law allows no fraction of a day. General computation of time in penal laws is taken incluſively.

EYRE, *Juſtice*. This is a point that has never been ſettled.

POWYS *ſenior* was of opinion, that the three days were to be reckoned excluſively.

An information that an offence was committed at the houſe or ſhop of *A.* ſituate, &c. is good.

1. Term Rep. 241.

THE SECOND EXCEPTION was, that the conviction ſets forth the bread to be bought "*apud domum manſionalem ſive ſhopam*" of the baker, ſituate in the pariſh of *St. Sepulchre*, in the county of *Middleſex*, within the juriſdiction of the juſtices; and it was ſaid, that it is uncertain whether the bread * was bought at the ſhop or the houſe, and uncertain which of the two were ſituate in the county of *Middleſex*, within the juriſdiction, and conſequently uncertain whether the juſtices had juriſdiction?

* [213]

POWYS, *Juſtice*. Both houſe and ſhop muſt be ſituate, &c. for the word "ſituate" plainly relates to both.

In an information on a penal ſtatute, it is ſufficient to ſtate, that the defendant was *duly ſummoned*.

THE THIRD EXCEPTION was, that the conviction ſets forth, that being *debitè ſummonitus*, and not appearing, they proceeded, &c.; whereas natural juſtice requires, that the defendant ſhould have had a reaſonable time allowed him for the making his defence.

PARKER, *Chief Juſtice*. This is a material objection. It is not ſaid, that he was ſummoned to appear at a certain time, or any time, or when the ſummons was made.

POWYS *junior*. It is to be conſidered, whether, when it is ſaid that he was *debitè ſummonitus*, the word *debitè* does not import all reaſonable circumſtances relating to that ſummons; and I am of opinion it does (*a*).

A conviction muſt ſtate the evidence given by the witneſs.

Salk. 369.

THE FOURTH EXCEPTION was, that the evidence upon which he was convicted is not ſet forth. It is ſaid, indeed, that the witneſs was ſworn *de veritate præmiſſorum*; but it does not appear what the anſwer of the witneſs was; it is only ſaid, that it did appear,

(*a*) That *appearance* ſupplies the place of *ſummons*, the caſes of The King *v.* The Mayor of Wilton, and The Queen *v.* King were quoted.—NOTE *to former edition.*

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from what was ſworn to the juſtice, that he was guilty; but it ought to have appeared ſo to the Court, from the nature of the evidence, ſpecially ſet forth. THE QUEEN *againſt* GREEN.

And THE COURT was of this opinion (*a*).

EYRE, *Juſtice*. There may be another exception taken to the conviction; for I am very doubtful, whether a juſtice of peace can, by this ſtatute, upon default, proceed to judgment.

The conviction was quaſhed *niſi*.

(*a*) See Rex *v.* Baker, 1. Stra. 316. Rex *v.* Theed, 2. Stra. 919. Rex *v.* Lloyd, 2. Stra. 999. Rex *v.* Simpſon, ante, . poſt. . Rex *v.* Vipont, 2. Burr. 1163. Rex *v.* Aikin, 3. Burr. 1786. Rex *v.* Kempſon, Cowp. 241. Rex *v.* Killet, 4. Burr. 2062. Rex *v.* Read, Dougl. 469. that the evidence muſt be ſet out in the conviction.

* [214]

* Jones *againſt* Gwynn. Caſe 113.

A declaration in an action on the caſe for maliciouſly proſecuting the plaintiff, ſtating, that the indictment was brought "*falſely* "*and maliciouſly*," but not adding, "*without* "*reaſonable or* "*probable* "*cauſe*," is good; for though the want of probable cauſe ought to appear upon the declaration, yet it need not be ſtated in thoſe words; but it muſt ſhew that the proſecution is at an end. S. C. ante, 148.

THIS was an action upon the caſe, wherein the plaintiff declared, that he had always maintained a good and honeſt character among his neighbours; that he got his livelihood by exerciſing *legitimo modo* the faculty of a badger of corn or grain: and that the defendant, *præmiſſorum non ignarus, ſed malitiosè intendens, &c.* cauſed him to be indicted for exerciſing the trade of a badger without a licence, *contra formam ſtatuti*. Upon this declaration there is a joinder in demurrer.

PARKER, *Chief Juſtice*, delivered the reſolution of the Court, that judgment ſhould be given for the plaintiff.—The exceptions taken to the declaration were four. THE FIRST and moſt material one was, that the indictment was declared only to be brought "*falsò et malitiosè*," but not "*abſque rationabili et probabili* "*cauſâ*." This action cannot, indeed, be ſupported, unleſs the indictment was groundleſs, and without a probable cauſe; but no one authority was cited to prove, that theſe very words are neceſſary to be uſed; and there are many authorities wherein they are wanting (*a*). If an averment of the plaintiff's honeſty, &c. and that the defendant *præmiſſorum non ignarus* will import theſe words, here they are. * But the true anſwer to this objection is, that the word "*malitiosè*" implies it to be *abſque rationabili et probabili cauſâ*, and a great deal more. The word "*malitia*" is an abſtract of *malus*, which imports what is wicked; and can admit of no poſſibility of excuſe. Among THE ROMANS, it ſignified a mixture of hatred and fraud; and what was utterly repugnant to ſimplicity and honeſty: and thus it is defined by CICERO, in his third book *de Natura Deorum*, and in his third book of *Offices*. Thus it is uſed in the civil law, and thus in our's. What we call *malice implied*, is murder, attended with ſuch circumſtances as can admit of no excuſe. My *Lord Coke*, in his expoſition of the ſtatute of

* [215]

S. C. 1. Salk. 15, S. C. Gilb. 185.

(*a*) Cro. Jac. 193. 1. Roll. Abr. 113.

JONES against GWYNN.

Weſtminſter the Second (a), ſays, that "an appeal brought *per* "*malitiam* is an appeal that wants a foundation, and is groundleſs." In conſpiracy, theſe words are uſed (*b*). The indictment of a man for what a civil action might have been brought, imports malice (*c*).

THE SECOND EXCEPTION to the declaration was, that the plaintiff had not averred that he was licenſed to exerciſe the trade; this has been held neither neceſſary nor proper; but he has ſaid enough, *viz.* that *legitimo modo* he exerciſed the trade of a badger.

THE THIRD EXCEPTION to the declaration was, that it was not ſaid that he was acquitted by verdict. But the word "*acquieta-*"*tus*" imports acquittal by verdict (*d*).

THE FOURTH EXCEPTION to the declaration was, that the proſecution of this indictment could not be a malicious one, becauſe the plaintiff in his replication has confeſſed *that* which was a
*[216] probable cauſe for it, *viz.* the uſing the trade of a badger. * To this it may be anſwered, that this is no probable cauſe; for it is not the exerciſe of the trade, but doing it without a licence, that conſtitutes the crime.

And now I come to THE MATTER IN LAW, *viz.* that the exerciſing the trade of a badger, not being, &c. is not an offence indictable; and if ſo, it is ſaid, the action is not maintainable. The force and ſtrength of this objection may be reſolved into the ſix following points:

FIRST, An acquittal upon an inſufficient indictment will not intitle a man to the plea of *autrefois acquit* to another indictment for the ſame offence.

SECONDLY, That conſpiracy lies not where the indictment was inſufficient.

THIRDLY, That conſpiracy lies not but for ſuch an indictment upon which the defendant was ſo acquitted, as that he may plead his acquittal in bar of another indictment.

FOURTHLY, By a parity of reaſon it may be inferred, that an action upon the caſe will not lie likewiſe, upon an indictment for a matter not indictable; and upon which, conſequently, there could not be ſuch an acquittal as could be pleaded in bar of another indictment.

FIFTHLY, That where the matter of the indictment, though it be not indictable, is infamous and ſcandalous, an action upon the caſe will lie; but that it is otherwiſe where the indictment contains matter neither indictable nor ſcandalous.

(*a*) 2. Inſt. 331.
(*b*) Staunf. P. C. 172. b.
(*c*) 2. Mod. 306.
(*d*) See Wicks *v.* Fentham, 4. Term Rep. 247.

SIXTHLY,

SIXTHLY, That this action lies not, becauſe upon this indictment the party was never in danger; for judgment could not poſſibly be given againſt him.

I ſhall meet with all theſe points in ſpeaking to the four following propoſitions:

FIRST, That to the ſupporting of this action it is not at all material, whether the indictment was ſufficient or inſufficient.

* SECONDLY, That there can be no argument drawn from a parity of reaſon between *actions of conſpiracy* and *actions upon the caſe*. * [217]

THIRDLY, That there is no foundation for ſuch a diſtinction, as where the matter of the indictment is ſcandalous, and where it is not,

FOURTHLY, That the party's being in danger, or not in danger, upon the indictment, is not at all material.

As to THE FIRST POINT, *viz.* that the ſufficiency or inſufficiency of the indictment is not at all material to the ſupporting of this action; it is to be conſidered, that the grounds of this action are, on the plaintiff's ſide, *innocence*, and on the defendant's, *malice*. The damage a perſon may ſuſtain by an indictment may relate either to his perſon, his reputation, or his property; and each of theſe is reſolved, in the caſe of *Savil v. Roberts*, to be a juſt ground of this action (*a*); and damage in the laſt reſpect, *viz.* to *property*, is there looked upon as ſtrong as any. It is true, that in the caſe of *Chamberlain v. Preſcot* (*b*), there is a reſolution not ſo agreeable with that of *Savil v. Roberts*, which yet the late *Chief Juſtice* HOLT, in his excellent argument upon the caſe of *Savil v. Roberts*, where he gives the reſolution of the Court, ſeems unwilling to deny to be law, though he might. I own my opinion to have been, at firſt, that where the indictment was neither ſcandalous, nor ſufficient, this action would not lie, but upon further conſideration I have changed my mind; for the impriſonment, the vexation, and the expence, are the ſame upon * a groundleſs and inſufficient indictment as upon a good one; for quaſhing an indictment is not always in a man's power; demurring is hazardous, and what a man in prudence would not do when he is ſure of being cleared by a verdict; and if upon a demurrer there be any difficulty, it is equally expenſive with an acquittal upon verdict. But it is the expence, not the *quantum* of the expence, which is material (*c*). And as the plaintiff is equally damnified by an inſufficient as ſufficient indictment, ſo the malice of the defendant is not at all leſs becauſe the matter was not indictable; nay, it is rather an aggravation (*d*). The only *remora* to thoſe actions is the fear of diſcouraging juſt proſecutions; but to this, malice is a full and ſufficient anſwer (*e*). It is certainly not rea- See p. 149. * [218]

(*a*) 5. Mod. 394. 405. 1. Ld. Ray. 374. 12. Mod. 208. Carth. 416.
(*b*) Raym. 135.
(*c*) Year-Book 3. *Edw.* 3. fo. 19. 3. Cro. 291.
(*d*) 1. Roll. Abr. 112.
(*e*) 3. Cro. 563. Raym. 135.

 ſonable,

JONES *against* GWYNN.

sonable, that more favour ſhould be ſhewed to a bad indictment than to a good one. It ought to be conſidered, that a ſmall ſlip vitiates an indictment; and if that ſhall protect a man from an action, a way is opened for the malicious to ruin the innocent; for how eaſily may a ſlip be made on purpoſe? To the caſes cited in maintenance of the objection, I anſwer, that one is 9. *Edw.* 4. 12. an action of conſpiracy; and there I allow the law to be ſo. The other is 1. *Rolle's Abr.* 110. which is indeed a caſe to the purpoſe; but then I obſerve, that the foundation of the reſolution is built upon the parity of reaſon that was ſuppoſed to be between conſpiracy and this action now before us.

And therefore I come now to my SECOND POINT, *viz.* to ſhew that there is no arguing from one ſort of action to the other.—

* [219] * Actions of conſpiracy are the worſt ſort of actions in the world to be argued from; for there is more contrariety and repugnancy of opinions in them than in any other ſpecies of actions whatever. I readily admit, that unleſs the indictment be either determined, or deſerted, this action is not maintainable (*a*). Conſpiracy lies not without acquittal; and the reaſon of this, and the only one, is, becauſe this is a formed action, and the form of the writ in THE REGISTER is ſo (*b*). The caſe of *Smith v. Craſhaw* (*c*) is a notable caſe, where ſeveral good diſtinctions are taken between caſe and conſpiracy. There is certainly no arguing from an action which is a formed one, for which there is a formal writ in THE REGISTER, to an action upon the caſe, that is tied down to no form at all. If an action upon the caſe be brought upon an indictment, where the jury find *ignoramus*, there is no poſſibility that there can be an acquittal (*d*). *Similiter* where indictment *coram non judice* (*e*). *Similiter* where an indictment is inſufficient, and goes off on that account (*f*).

THE THIRD PROPOSITION was, that there was no reaſon for making a difference, when the matter of the indictment is ſcandalous, and when not. The caſes before mentioned ſpeak not a word of this difference; and if ſcandal be mentioned, it is only mentioned in the nature of damage (*g*).

* [220] *THE FOURTH PROPOSITION was, that the danger of the party was not material. It is not the danger, but the expence, which is the ground of damage. All the danger in this caſe, if the indictment had been good, would only have been incurring a fine; *et antea oſtenſum*, the *quantum* of the damage is not material. When upon an indictment *ignoramus* is returned, or when the indictment is *coram non judice*, the party is in no danger at all, yet this action lies.

Page 218.

Judgment for the plaintiff.

(*a*) Yelv. 126.

(*b*) Regiſter, 134. b.—See alſo Year-Book 17. *Edw.* 2. 509. 9. Co. 56. Cro. Jac. 130. 1. Roll. Abr. 114.

(*c*) Reported W. Jones. 94. 1. Cro. 15. and likewiſe 1. Roll. Abr. 112.

(*d*) Cro. Jac. 150. 490. Palm. 44. Styles, 10. Raym. 118. 1. Roll. Abr. 114.

(*e*) Stiles, 372. 378.

(*f*) Cro. Jac. 32. Yelv. 46. Stiles, 372. 157. 3. Keb. 141.

(*g*) W. Jones, 93. Stiles, 378.

The

The Queen *againſt* The Inhabitants of Mancheſter. Caſe 114.

IT was moved to quaſh an order of juſtices for the payment of two ſhillings a week, until further order, to *H.* for the relief of herſelf and four poor children.

An order of relief muſt ſtate, that the object of it is poor and indigent.

THE FIRST EXCEPTION was, that the order did not ſet forth that *H.* was indigent, which is the very foundation of the juſtices juriſdiction.

S. C. Gilb. 137. S. C. Sett. & Rem. 21.

And for this reaſon the order was quaſhed.

THERE WAS ANOTHER FAULT in the order, *viz.* that the money was made payable "until further order," whereas it ſhould have been "during her poverty."

An order of relief "*until further order*" is bad.

Sed vide contra, Salk. 534.

EYRE, *Juſtice.* Had this been an order for ſettlement, the not naming the children had been a fault.

An order of removal muſt name the children.—Salk. 488. 1. Mod. Caſes in Law and Equity, 337.

* The Queen *againſt* Dunn, or Pariſhes of Halifax and Overton, in the Weſt Riding of Yorkſhire. Caſe 115.

AN ORDER OF TWO JUSTICES was made upon the father-in-law, for maintaining the widow of the ſon.

An order for maintenance of a poor relation muſt ſtate the ability of the party.

It was quaſhed; becauſe it was not ſet forth in the order, that the father was of ſufficient ability, in which caſe only the act enables the juſtices, &c.

EASTER TERM,

The Thirteenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir Thomas Powys, *Knt.*
Sir Edward Northey, *Knt. Attorney General,*
Sir Robert Raymond, *Knt. Solicitor General.*

* Turner *againſt* Goodwin.

Caſe 116.

To debt on bond conditioned to pay ſo much money, for which the obligee had recovered judgment againſt *A.* upon conſideration that the obligee would forbear to ſue out execution againſt *A.* and aſſign over the judgment; the aſſignment is not a *condition precedent*; and therefore if the defendant plead that the obligee had not aſſigned; a replication that the plaintiff was *ready to aſſign*, is good.—S. C. ante, 154. 189. S. C. Gilb. 40.

IT WAS AGREED on both hands that the queſtion was no more than this, Who was obliged to do the firſt act? for if the judgment was to be aſſigned before the payment of the money, then judgment muſt be for the defendant; but if, &c.

SALKELD, *for the defendant*, ſaid, that theſe acts of paying the money and aſſigning the judgment, were alternate acts, which cannot go on *æquis paſſibus*, but there muſt be a priority in law. That in law, proper and formal words of condition are not required, either in wills, grants, or contracts. Nor in wills (*a*). Nor in grants (*b*); as in the grant of an annuity *pro conſilio impendendo:* but the reaſon aſſigned by *Coke* not a good one; for the true reaſon is, that the law implies * a condition, becauſe elſe there would be no remedy (*c*). The caſe chiefly relied upon for the defendant was the Year-Book of *Henry the Fourth* (*d*), which was

(*a*) Cro. Eliz. 46. 454. 2. Roll. Rep. 68.
(*b*) Co. Lit. 204.
(*c*) Gray's Caſe, 5. Co. 78.
(*d*) 14. *Hen.* 4. pl. 19.

debt

TURNER *againſt* GOODWIN

debt upon bond, conditioned, that if the defendant reſigned his living by ſuch a time, for a certain penſion to be conveyed to the parſon, then, &c.

REEVES, *for the plaintiff*, urged, that the words "aſſigning "the judgment" did not make a condition precedent, from the neceſſary import of the words; and to ſhew this ſeveral authorities were quoted (*a*), where this way of expreſſion was uſed, and yet not held a condition precedent. It is objected, that the condition of a bond is always to be taken in that ſenſe that is moſt favourable to the obligor, which is, that this ſhould be a precedent condition. This rule is generally true, but not always (*b*). It is alſo objected, that if the money muſt be firſt paid, the defendant is without remedy for the judgment. But I anſwer no, for the plaintiff in that caſe becomes a truſtee to the defendant for the judgment; the aſſigning of the judgment, being only a deed to manifeſt that truſt (*c*). Aſſigning a *choſe in action*, is interpreted as a covenant againſt the aſſignor (*d*); and therefore if the money be paid, and no judgment aſſigned, it is a breach of covenant. In caſe of a mortgage, money is always paid firſt. This aſſignment muſt make mention of the money as paid firſt; ſince otherwiſe it will want a good conſideration, and be void, for it will be maintenance (*e*).

* [224] * To this it was anſwered, that the aſſignment need not recite the money as paid, but only the bond and the ſpecial agreement.

Laſtly, this diſtinction was offered by THE COUNSEL *for the plaintiff*, in anſwer to ſeveral caſes, that if by the agreement of parties two acts are to be done, and time is limited for the doing of one, and no time for the other; there, if the nature of the thing will bear it, that thing is to be done firſt for which the time was limited (*f*).

Afterwards, in next Term, judgment was given for the plaintiff.

(*a*) 3. Cro. 146. 204. 454. 2. Roll. 68. T. Jones, 205.

(*b*) 5. Co. 23. 1. Vent. 255. 2. *Hen.* 7. pl. 8, 9.

(*c*) But to this it was replied, that this was not a remedy in law but in equity.—NOTE *to the former edition.*

(*d*) 1. Mod. 113.

(*e*) 3. Leon. 234. Noy, 52. 3. Cro. 552. 170. 34. *Hen.* 6. 30. Brook "Maintenance" 8. 1. Bulſtrode, 187.

(*f*) 1. Vent. 147. 1. Saund. 319. 1. Lutw. 251. 1 Cro. 384. 2. Saund. 350. 352. 1. Lutw. 490. 565.

Caſe 117.

Timber *againſt* Gardiner.

Aſſumpſit. Action upon the caſe.

ACTION UPON THE CASE for ſeveral promiſes; the defendant pleads, that he gave the plaintiff ſuch a quantity of, &c. and the plaintiff accepted it in full ſatisfaction of the ſaid promiſes; the plaintiff demurs; and defendant joins in demurrer.

IT WAS INSISTED *for the plaintiff*, that the defendant's plea was naught, becauſe it was not ſaid that the defendant gave it in ſatisfaction. 5. *Co. Rep.* 117.

THE

THE COURT. If the defendant gave it with one intention, and the plaintiff accepted it with another, the intention of the donor muſt prevail; but the queſtion here is, Whether the words "full ſatisfaction" ſhall not as well relate to the verb "give," as the verb "accept;" eſpecially becauſe of the conjunction "*et*," which ſeems to difference it from the caſe mentioned?

TIMBER *againſt* GARDINER.

Adjournatur.

* [225]

* Shiply *againſt* Shiply.

Caſe 118.

A WRIT OF DOWER was brought in the court of common pleas. The defendant pleaded, as to all the lands lying in the vill of *B. a bar* by reaſon of *a fine levied*; and as to all the lands lying in the vill of *C.* beſides twenty-four acres, *a bar* by *releaſe*; and as to thoſe twenty-four acres in *C.* the defendant pleaded *non-tenure.* The demandant in her replication admitted, that as to all the acres beſides the twenty-four acres, *the fine* and *the releaſe* are ſufficient bars, and joins iſſue upon the *non-tenure.* A verdict was found for the demandant, and judgment was given for the demandant as to the twenty-four acres; and as to the reſt, the judgment was, that the demandant "*pro falſo clamore ſuo ſit inde in miſe-*"*ricordiâ, &c.* and that the defendant *eat inde ſine die, &c.*" On a writ of error being brought on this judgment in the court of king's bench,

Writ of dower.

IT WAS INSISTED, that the judgment itſelf was erroneous for want of a *nil capiat per breve*; and for this was cited 8. *Co. Rep.* 62. *Co. Entries*, 320. 323. 326. *Cro. Jac.* 284.

IT WAS URGED by the Counſel for the defendant in error, in anſwer to this, that if this were a good cauſe to reverſe the judgment, it would ſhake the authority of a thouſand judgments; the caſes being endleſs where the words "*nil capiat per* "*breve*" are omitted (*a*). And then inſiſted upon, that if this were a fault, it would be aided by 16. & 17. *Car.* 2. c. 8. where are theſe words, "and all other matters of like nature."

THE COURT. The utmoſt conſequence of this objection is, that we muſt give the ſame judgment that the court of common pleas ought to have done.

Salk. 262. 401.

* IT WAS OBJECTED by the Counſel for the defendant in error, that the writ of error was ſo general and uncertain, that the Court could not ſay the record was before them; for there being ſeveral ſorts of dower, and this writ of error being only *dotis* generally, it was uncertain what record the writ of error was to remove.

* [226]

(*a*) Townſend's Firſt Book of Judgments, 53, 54. Co. Ent. 657. Raſtal's Ent. 654. 677.

IT

Reply against Reply.

IT WAS OBJECTED LIKEWISE, that the writ of error ſhould have ſet forth the vill (*a*).

But theſe objections were over-ruled, as being of that nature as if it was neceſſary for the whole declaration to be ſet forth in the writ of error. In debt, though there are ſeveral ſorts of debt, the writ of error is *de placito debiti*, without ſaying more, whether bond, &c, (*b*). So in treſpaſs, the writ of error is *de placito tranſgreſſ.* and yet ſeveral treſpaſſes.

Abridgment in dower.

The principal point inſiſted upon for the plaintiff in error was, the want of abridgment. It was ſaid, that if the lands out of which dower was demanded had been all in one vill, and it had appeared by the demandant's own confeſſion, that the demandant had made too large a demand, in that caſe the demandant ought to abridge her own demand; but if the land lie in two vills, then this abridgment is not permitted; but the writ muſt abate for making too large a demand. But granting that an abridgment of the demand may be permitted, where land lies in two vills, as *Fitzherbert* (*c*) ſeems to allow, yet the judgment was erroneous, becauſe here is no abridgment (*d*).

The judgment given in the court of common pleas was affirmed *niſi*; and the *Earl of Clanrickard's Caſe* (*e*) relied upon, as a caſe in point.

(*a*) Co. Ent. 248.
(*b*) 2. Saund. 43. 328.
(*c*) Fitz. Abr. "Plaint" pl. 17.
(*d*) The following authorities were quoted: The Year Books 9. *Hen.* 6. 43. 2. 14. *Hen.* 6. fo. 3. 19. *Hen.* 6. pl. 13. 7. *Edw.* 3. fo. 10. Raſtal, 232. 5. 234. c. and Robinſon's Entries, 281.
(*e*) Hob. 273.

Caſe 119.

* The African Company *againſt* Maſon.

In debt on bond, the plaintiff can only aſſign a ſingle breach of the condition.

S. C. Gilb. 238. 1. Stra. 227. 2. Burr. 773.

DEBT UPON BOND: Upon *oyer* of the bond the condition of it appeared to be, that *Maſon* ſhould be factor for the Company at *Briſtol*, and ſhould behave himſelf faithfully in that and all affairs he ſhould be employed in by the Company; and ſhould, when required, pay to the uſe of THE COMPANY all the ſums of money in his hands and in his poſſeſſion, received by him for the Company.

The defendant pleaded performance of the condition generally.

The plaintiff in his replication aſſigned for breach, that the defendant, after the making of the ſaid bond, and before the bringing of the action, did at *London* receive of *Jacob Reynolds* and divers others, for the uſe of the Company, ſeveral ſums of money to the value of three hundred and ſeventy-ſix pounds, and that he was requeſted to pay this money, and had not paid it.

The defendant demurred.

It was objected to the replication:

FIRST,

THE AFRICAN COMPANY *againſt* MASON.

FIRST, That to ſay the defendant received ſeveral ſums of *Jacob Reynolds* and others to the value of three hundred and ſeventy-ſix pounds, was uncertain and double. Indeed in covenant, becauſe the party is to recover damages in proportion to the damages aſſigned by the breach, and to prevent prolixity, ſuch a way of pleading is permitted; but not in a bond, becauſe if the plaintiff had aſſigned but one particular ſum, how ſmall ſoever, the whole penalty of the bond is forfeited (*a*).

SECONDLY, That the replication was not within the condition of the bond; for the receipt was by the condition to be at *Briſtol*, and the receiving was in the replication ſet forth to be at *London*, and not ſaid to be received upon account of the affair of *Briſtol*.

* THIRDLY, That it is not ſet forth in the breach, that the money, when demanded, was in his hands and poſſeſſion. * [228]

FOURTHLY, That it is not ſaid, that he was employed to receive the money.

IT WAS INSISTED *for the plaintiff*, that the breach was well aſſigned; for in breaches of a complicated nature, ſuch a general kind of aſſignment is allowed (*b*). Anciently no allowance was made to avoid prolixity in pleading, and therefore *performance generally* was not allowed; but this was altered in *Queen Elizabeth's* time, where pleading as general as this was allowed (*c*). The breach aſſigned is ſingle; for the not paying when required is the breach, the receiving, &c. but matter of inducement.

The plaintiff perceiving the opinion of the Court to be ſtrongly againſt him, eſpecially upon the firſt and third objections, obtained leave to *diſcontinue*, upon the payment of coſts (*d*).

(*a*) Brigſtock *v.* Stannion, 8. *Will.* 3. in the common pleas. Salk. 140.

(*b*) 1. Lev. 94. Lut. Ent. 580. Chambers *v.* Prieſtland, Mich. Term, 4. *Ann.*

(*c*) Cro. Eliz. 253. 749. 916.

(*d*) See Stiles *v.* Clough, 1. Stra. 227. Cornwallis *v.* Saverey, 2. Burr. 772. Jones *v.* Williams, Dougl. 203. Bache *v.* Procter, Dougl. 367.

Muſton *againſt* Yateman. Caſe 120.

THIS was an ACTION OF TRESPASS.—The defendant pleaded, that *Sir Thomas Freke* was *ſeiſed* of a place called *Ten Acres*, and demiſed the ſame to the defendant for ninety-nine years; and that *Sir Thomas Freke*, and all thoſe whoſe eſtate he had, did time out of mind uſe ſuch a way, &c.

To treſpaſs, *Qu.* Whether a juſtification ſtating that *A.* was *ſeiſed* of the place where and demiſed it to the defendant, without ſtating of what *eſtate* he was ſeiſed, is good, after iſſue on a replication *de injuria*, &c. and verdict for the defendant.—S. C. poſt. 300. S. C. Gilb. 305.

The plaintiff replied "*de injuriâ ſuâ propriâ* ABSQUE HOC "*quòd prædictus* THOMAS FREKE, and all thoſe whoſe eſtate he "had, did time out of mind, &c."

Upon

MUSTON against YATEMAN.

Upon this iſſue joined, and jury find that *Sir Thomas Freke*, * and all thoſe whoſe eſtate he had, did time out of mind, &c.

* [229] IT WAS MOVED *in arreſt of judgment*, that the juſtification was naught, becauſe it was *ſeiſitus* generally, and the eſtate not ſet forth of which he was ſeiſed, whether life, tail, or fee; and that therefore, ſince every man's plea is to be taken in that ſenſe that is moſt prejudicial to the pleader (becauſe in law a man is always preſumed to make the beſt of his own caſe), by *ſeiſitus* here muſt be intended a ſeiſin for life, which will not ſupport preſcription.

Hob. 234. 242. This objection was alſo turned another way, *viz.* that this plea was naught for the uncertainty; it might be a ſeiſin for life, tail, or in fee.

IT WAS URGED *in ſupport of the plea*, that the jury could not poſſibly have found the verdict they gave, unleſs it had been a ſeiſin in fee; and ſeveral caſes were quoted (*a*) to ſhew, that a verdict cures all defects where it was poſſible for the verdict to have been given, unleſs that had appeared which was wanting in the pleading.

PARKER, *Chief Juſtice*. It muſt have been given in evidence that he was ſeiſed in fee; for he who has an eſtate only for life, has nobody's eſtate but his own; and then it was impoſſible for the jury to find, as they have done, *viz.* "That *Sir Thomas Freke*, "and all thoſe whoſe eſtate he had, did, &c.

EYRE, *Juſtice*. "Seiſed *de feodo*," is always the form of pleading; and therefore neceſſary. Whether the verdict has cured it I cannot ſay.

* [230] * POWYS *junior*. Preſcription for the way is the only matter in iſſue; the ſeiſin is only inducement, and paſſed over at *niſi prius*.

PARKER, *Chief Juſtice*. The only queſtion is, Whether the iſſue be a material iſſue? for if it be, then by the expreſs words of the act, all defects in pleading are cured by the verdict.

Adjournatur (*b*).

(*a*) Hutton, 254. T. Jones, 132. Raym. 487. 1. Lev. 308.

(*b*) This caſe was argued again in Eaſter Term, the 1. *Geo.* 1. poſt. 300. But it does not appear in any of the reports of this caſe what judgment was given. S. C. Gilb. Rep. 307. See Cary *v.* Holt, 2. Stra. 1238. Helwis *v.* Lamb, Salk. 453.

EASTER TERM,

The Thirteenth of Queen Anne,

IN

The Houſe of Lords.

Roper *againſt* Radcliffe.

Caſe 121.

JOHN ROPER being ſeiſed in fee of lands in *Cornwall*, *Glouceſter*, and *Monmouth*, did by leaſe and releaſe convey the premiſes to *William Conſtable*, *Richard Snow*, and *Daniel Hickman*, and their heirs, in truſt to ſell the ſame, and out of the purchaſe money, and rents, until ſale, to pay a debt of four thouſand pounds, due to *Elizabeth* and *Heſther Walden*, by mortgage of the premiſes, with intereſt; then in truſt for the payment of debts mentioned in a ſchedule, to the deed annexed; and the overplus of the money ſo to be raiſed, to be paid as the ſaid *John Roper* by any writing atteſted, or by his will, ſhould appoint; and for want of ſuch appointment, in truſt for the benefit of the ſaid *John Roper* and his heirs. This deed bore date the eighteenth of *January* 1708. On the fifth of *March* 1708, the ſaid *John Roper* made his will, reciting the ſaid leaſe and releaſe, and the power reſerved to him, in the ſurplus of the ſaid real eſtate, and bequeathed ſeveral pecuniary legacies in the will mentioned to his relations, and the reſidue of * all his real and perſonal eſtate he gave to the reſpondents *William Conſtable* and *Thomas Radcliffe*, to *Robert Hewit* and *Daniel Hickman*, and to their heirs and aſſigns for ever. On the firſt day of *April* 1709, the ſaid *Roper* added a codicil to his will, and thereby gave the ſeveral further legacies therein mentioned, and all the remainder, whether in lands or perſonal eſtate, he gave to his executors, the reſpondents *Radcliffe* and *Conſtable*, and ſoon after died.

If a *Roman* Catholic convey his eſtate in truſt to be ſold for the payment of a mortgage, and diſcharge of his debts, and the reſidue to be paid as he ſhould by his will direct; a deviſe of the reſidue to *a papiſt* is void by the ſtatute 11. & 12. *Will.* 3. c. S. C. ante, 89. S. C. 9. Mod. 167. 181. S. C. 2. Eq. Abr. 508. 592. 620. 771. S. C. 1. Bro. P. C. 450. S. C. 1. Stra. 267.

* [231]

THE RESPONDENTS *Thomas Radcliffe* and *William Conſtable* brought their bill in chancery againſt the appellant, and alſo againſt the ſaid *Hickman*, *Hewit*, *Snow* and others, to have the truſt-eſtate ſold, and for an account of profits, and after the debts and legacies paid, to have the ſurplus money ariſing by ſale, equally divided between the reſpondents, according to the codicil.

THE

ROPER *againſt* RADCLIFFE.

THE APPELLANT put in his anſwer, inſiſting that he was heir at law to the teſtator, and intitled to all ſuch real eſtate as was undiſpoſed of by him; and that the reſpondents *Radcliffe* and *Conſtable* are, and at the time of the teſtator's deceaſe were *papiſts*, and as ſuch, the appellant was adviſed, that by virtue of an act in 11. & 12. *Will.* 3. made for the preventing the growth of popery (*a*), the reſpondents were rendered "incapable of purchaſing "in their own names, or the names of any other perſons, to their "uſe, or in truſt for them, any manors, lands, profits out of lands, "tenements, rents, terms or hereditaments, and that all and ſin-"gular eſtates, terms, and any other intereſts or profits whatſoever "out of lands, to be made, ſuffered, or done, to or for the uſe or "behoof of any ſuch perſon or perſons, or upon any truſt or con-"fidence, mediately or immediately, to or for the benefit or relief "of any ſuch perſon or perſons, ſhall be utterly void, &c." and that all intereſts or profits made out of lands to the uſe of the reſpondents were void.

* [232] * And the appellant being heir at law, and a proteſtant, claimed the benefit of the ſaid eſtate, and inſiſted that he was intitled to the ſaid *John Roper's* real eſtate not ſufficiently deviſed or conveyed by him, ſubject to ſuch incumbrances as he *bona fide* had charged thereon, and by law was capable of doing, and demanded the judgment of the Court, Whether he ſhould be decreed to join in the ſale.

Robert Hewit and *Daniel Hickman* inſiſted by their anſwer, that the real eſtate deviſed by the ſaid will ought to be conſidered, as to the remaining part of the teſtator's lands, after a ſufficient part ſold for the payment of debts and legacies, as land, and not as perſonal eſtate; and that ſo much only ought to be ſold as would be ſufficient to pay the debts; and in caſe the reſpondents were incapable of taking, then the ſaid *Hewit* and *Hickman*, the proteſtant executors, claimed the eſtate, as being the only deviſees capable to take the ſame; and inſiſted, that the codicil, with reference to the deviſe of the remainder of the teſtator's lands, did not controul the deviſe thereof, mentioned in the will; for that, if the reſpondents were incapable to take the lands as purchaſers by the deviſe, they were to be eſteemed as perſons not *in eſſe*; and that the codicil in ſuch caſe, as to the deviſe of the ſaid lands, was void in law.

HARCOURT, *Lord Chancellor*, at the preſſing inſtance of the appellant's Counſel, called in to his aſſiſtance PARKER, *Chief Juſtice* of the court of king's bench; *Chief Juſtice* TREVOR of the court of common pleas; POWELL, *Judge* of the court of king's bench; and SIR JOHN TREVOR, *Maſter of the Rolls*.

And a caſe was made by conſent, conſiſting of three queries:

(*a*) But ſee the ſtatute 18. *Geo.* 3. c. 60.

FIRST,

FIRST, Whether a papiſt can convey his land by deed to truſtees, to be ſold for the payment of debts and legacies, the ſurplus of the money to go to papiſts? ROPER *againſt* RADCLIFFE.

SECONDLY, Whether he may do this by will?

* THIRDLY, Whether a papiſt is diſabled by this act of parliament from taking land by deviſe? * [233]

Upon argument before the Lord Chancellor and theſe Judges, IT WAS RESOLVED by the conſent of all but PARKER, *Chief Juſtice*, that the deviſe of the ſurplus-money "after debts and legacies paid" to the reſpondents *Conſtable* and *Radcliffe*, was a good deviſe, notwithſtanding the ſaid ſtatute for diſabling papiſts from purchaſing lands; the ſurplus-money being a perſonal intereſt in them, and therefore not made void, either by the words or by the intention of that act.

As to *Hewit* and *Hickman* (who had brought their croſs-bill) they were diſmiſſed without coſts; THE COURT being of opinion, that the codicil, whereby the teſtator gives his remainder, whether in lands or perſonal eſtate, to the reſpondents *Radcliffe* and *Conſtable*, was a revocation of the deviſe in his will, of the reſidue of his perſonal and real eſtate, to *Conſtable*, *Radcliffe*, *Hewit*, and *Hickman*; even ſuppoſing the perſons named in the codicil were diſabled by the act.

From this decree an appeal was brought in THE HOUSE OF LORDS.

It was argued for the appellant by SIR JOSEPH JEKYLL and MR. LECHMERE, and for the reſpondents by SIR ROBERT RAYMOND, *Solicitor General*, and *Serjeant* PRATT.

N. B. The latter part of the decree, as to the revocation, was not controverted in the houſe of lords, but approved of by the Counſel of both ſides, as good law.

THE THIRD QUESTION was ſpoken to firſt, *viz.* Whether by this act of parliament, *a papiſt* was not excluded from taking land by deviſe?

IT WAS INSISTED *for the appellant* that he was; for otherwiſe the intent of the act would be quite overthrown, which was moſt certainly to prevent papiſts from making new acquiſitions. * And it is abſurd to imagine that the law-makers ſhould reſtrain papiſts from purchaſing eſtates, when they are to pay a valuable conſideration; and leave it free for them to take land by deviſe, where they are to pay nothing for it. There is no one word in the law, of a more determined and fixed ſignification than "purchaſe;" for it will not be controverted, but that the word "purchaſe" ſtands by law oppoſed to deſcent; and whoever does not come to land by deſcent, is, in the language of the law, ſaid to take by purchaſe. Legiſlators are preſumed to ſpeak the language of the law. A papiſt incapable of taking land by deviſe. * [234]

ROPER *againſt* RADCLIFFE.

They certainly who make laws, muſt know what the legal import of words is; and therefore acts of parliament are to be underſtood in a legal ſenſe, unleſs the ſubject matter of the act apparently hinders it. So in the *Statute of Mortmain*, it has been held, that the clauſe whereby a licence is given to purchaſe lands, includes taking by deviſe.

8. Mod. 177. 201, 202.

Lands deviſed to be ſold for payment of debts and legacies, ſurplus to a papiſt, this ſurplus is in nature of a real intereſt, and as ſuch void by ſtat. 11. & 12. *Will.* 3.

THE OTHER TWO QUESTIONS were reſolved into one, *viz.* Whether the intereſt that was given by the will and codicil, was ſuch an intereſt as *a papiſt* was reſtrained by the act from taking? For to ſtate the caſe, whether a papiſt be incapacitated by the act to take the overplus, is to narrow it too much. The diſability is to be conſidered as it ſtands at the time of the death of the teſtator, and not at a future time, *viz.* the ſale of the land. That the act of parliament deſigned to prevent papiſts from taking equitable intereſts, as well as legal ones, is ſo very plain from the words of the act, that it can admit of no diſpute. And, indeed, unleſs the act of parliament had done this, it had done nothing at all, ſince the uſe of truſts is become ſo general and univerſal; and there is as ſure a * remedy for a breach of truſt in chancery, as for any legal right in a court of law. It is objected, that the end of the act of parliament is plainly to oblige papiſts to turn their real eſtate into perſonal; and therefore here being a proviſion for the ſale of the land, by poſitive words in the deed of truſt, the end of the law is ſatisfied: the anſwer is, that if the meaning of the act is to be diſcovered from the words of it, it means this and more, *viz.* that *Roman* Catholicks ſhould have no handle, no influence over, or intereſt in the eſtate, ſo much as for an hour. For all this decree, the eſtate may be continued on, and the land never ſold; and until the land is ſold, the profits of the land belong to *Radcliffe*. If any advances have in fact been made towards a ſale, this may be wholly owing to the diſturbance this ſuit has given them. Who is there that will diſturb them in the enjoyment of the land, and inforce this part of the decree that relates to the ſale? ſince nothing can be got by it, but only obliging a papiſt to turn a real eſtate into a perſonal one. There is a caſe now depending in the court of chancery, wherein the conveyance is ſettled according to this precedent, with this variation only, that the truſtees are there impowered to ſell whenever they think convenient. *Vane v. Fletcher.* Poſitive directions to truſtees to ſell, do not oblige them to ſell; and they are never blamed by a court of equity for not ſelling, as long as *ceſtuy que truſt* enjoys the profits, and as long as his intereſt does not require a ſale. *Radcliffe*, according to the decree, is in effect to have the profits even before ſale; for ſince they are to be applied to the payment of debts, the *reſiduum* will conſequently be the larger. * "Hereditament" is one of the words of the act; and this imports any thing that is deſcendible from anceſtor to heir. In the *Earl of Meath's Caſe*, 1692, that went up to the houſe of lords, a daughter being to have ſuch an intereſt as money ariſing from the ſale of land, it was eſteemed ſuch an heir-

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Hereditament, what.

9. Mod. 189.

ſhip

ſhip as would give her the ſame privilege that an heir had. If ſuch an interpretation be offered to be put upon an act of parliament, made *pro bono publico*, as will make the act void, that is reaſon enough to reject it. If it be objected, that the church was by the *Statute De Religioſis* diſabled from taking lands by any manner of conveyance, and thereupon this evaſion was found out, and ſuffered to take place, *viz.* the church brought their action for ſuch land as they had a mind to purchaſe, and judgment was ſuffered to go by default, and this was held unanimouſly to be out of the ſtatute; and yet this an act made *pro bono publico*, and the intent of it as plainly eluded, as here it can poſſibly be; the anſwer is, that this reſolution ſtood upon a particular maxim of law, viz. *Judicium redditur in invitum*, and therefore the law will never preſume a fraud; but no judgment in the preſent caſe. If it be ſaid, that by this means a papiſt will be incapacitated to pay his debts; the anſwer is, that we are not bound to account for all accidents that may poſſibly happen. Suppoſe the will out of the caſe, and that it had ſtood intirely upon the deed of truſt, Muſt not the truſt have attended the inheritance? Would not *Mr. Roper's* widow have had a claim to dower out of it? or, Would not there, *mutatis mutandis*, have been a tenant by courteſy out of ſuch an eſtate? If this be ſo, then undoubtedly it is a real eſtate; for it is the courſe of ſucceſſion, and the law of deſcent, that is the * true characteriſtic of, and which conſtitutes the proper difference between real and perſonal eſtates. This is ſo true, that an annuity is the only perſonal intereſt, that can be thought of, which is deſcendible to the heir. Nor is there anything in the will to turn this into a perſonal intereſt. On the contrary, we find the teſtator himſelf in his will (which ſhews what he thought of it) calling it real eſtate. Nor was this an expreſſion that fell from him by chance; for though it is indeed true, that in the codicil he varies his expreſſion, yet he makes uſe of one that does more emphatically import the ſame thing, *viz.* land; his words are, "and all the re- "mainder, whether in lands or in perſonal eſtate." That the death of the teſtator is the only proper time to conſider, whether this intereſt was a real or perſonal one, appears plainly from hence, that this will would not be a diſpoſition of it, unleſs atteſted with three witneſſes, and duly executed according to the ſtatute of Frauds and Perjuries. A deviſee ſtands in the place of the teſtator, and cannot take any other eſtate than what it was at the time the will took place, *viz.* the death of the teſtator. Upon the death of the reſpondents, ſuppoſing them capable, the *reſiduum* would go to their heirs. If land be conveyed to truſtees, to be ſold for the payment of debts, remainder to their heirs, is not this remainder the very reverſion and eſtate? The addition of the power to ſell makes no alteration in the intereſt; it does not imply a neceſſity to ſell, but only a power to do it upon occaſion. The ſelling, or not ſelling, remains intirely in the power of the truſtees, and the *ceſtuy que truſt*. The heir can compel a conveyance in chancery upon payment of the debts; nay, he may determine what

ROPER *againſt* RADCLIFFE.

2. Inſt. 459.

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part of the land the truſtees ſhall ſell. * Upon the whole, this plainly appears to be ſuch an intereſt as carries along with it all the authority, power, and influence of the land, which the act moſt certainly deſigned to prevent. If land be appointed to be ſold for the payment of debts, the heir is intitled to the ſurplus-money, though no directions about it. If a mortgagee ſell, the ſurplus-money is to be anſwered to the heir at law, and not to the executor. This is an eſtate deviſed for the behoof and benefit of a *Roman* Catholick; becauſe he is to have the ſurplus, the *quantum* is not material. Land in its own nature, means land between proteſtants; but it muſt be perſonal eſtate only to elude the act. At the inſtant the teſtator died the right accrued, and therefore the incapacity muſt then attach, and likewiſe the intereſt then veſted in *Mr. Roper*; and the turning it afterwards into money will not deveſt an intereſt already veſted in the heir at law. To interpret a law ſo that the letter ſhall remain but the end be defeated, is in effect to aſſume a legiſlative power. Every *Roman* Catholick will be inſtructed in an eaſy way how to elude and fruſtrate this act of parliament. It is but contracting a debt, or giving a legacy; it may be done by deed as well as by will; for if this ſurplus be to be conſidered as perſonal intereſt, they are not diſabled from conveying a perſonal intereſt. They may convey without conſideration, if they conceal it; nay it cannot be diſcovered, for a bill would not lie in equity for this purpoſe, becauſe the diſcovery would induce a forfeiture.

ARGUMENT *for the reſpondents.* The word "purchaſe," in the vulgar and common acceptation of it, does not import deviſe. The word "purchaſe" is, in *Littleton's Tenures*, defined to be
* [239] "the poſſeſſion * of land that a man comes to by his own act;" a definition not applicable to deviſe. Papiſts may come to land by deſcent notwithſtanding this act, and therefore why not by deviſe; unleſs the legiſlators thought fit to prevent it. There are two rules to be obſerved in the interpretation of ſtatutes. Firſt, ſuch an interpretation muſt be made as will ſupport the intention of the act. Secondly, Such an interpretation muſt be made as will make the whole conſiſtent with itſelf. The general intention of this act was by gentle and eaſy methods to bring papiſts to conformity, and to prevent the increaſe of their landed intereſt; and therefore the firſt clauſe expreſsly provides, that the incapacity of the anceſtor ſhall not deſcend upon his poſterity; and whenſoever the perſon diſabled conforms, the diſability is gone. If an heir be under the age of eighteen at the time of the deſcent, he is diſabled by the act from taking the eſtate, unleſs within ſuch a time he conform, &c. whereas a perſon over that age may take by deſcent or deviſe, without any reſtriction at all; the reaſon of which difference was poſſibly this: The legiſlators looked upon perſons under the age of eighteen to be ſo young that they were capable of any impreſſion, and might be eaſily made proteſtants; whereas from that age and onwards, they would be ſo riveted and confirmed

firmed in their prejudices, that their converſion muſt be eſteemed as next to an impoſſibility. Now if the word "purchaſe" in the latter clauſe, be extended to take in deviſe, the latter clauſe will in many reſpects be repugnant and contradictory to the former. For whereas by the former clauſe, a perſon under the age of eighteen, on the twenty-ninth of *September* 1700, may take by deviſe, if within ſix months after he attains that age he takes the oaths, &c. the latter clauſe * thus interpreted makes ſuch a perſon abſolutely incapable. By the former clauſe, though ſuch perſon ſhould not within ſix months, &c. yet whenever he does conform, the incapacity is removed, and the deviſe ſhall take place; whereas by the latter thus expounded, he ſhall not. The word "purchaſe" therefore cannot be interpreted to include deviſe, without making the act contradict itſelf. The word "ſuch" is tied down to "purchaſe," and penal laws are never extended. A thing that is to be done muſt be looked upon as done. It is in the power of the truſtees, immediately upon the death of the deviſor, to ſell the land. As to the objection, that it appeared from the decree that the profits of the land, until ſale, did in effect go to *Radcliffe*, ſince the application of them to the diſcharge of the debts muſt increaſe the ſurplus; it may be anſwered, that the ſurplus would be more increaſed by having the land ſold immediately, the intereſt of the money ariſing from the ſale much exceeding the profits of the land. Though a court of equity will, at the deſire of the heir, or reſiduary legatee, decree them the land, yet it will not do this in ſpite of their teeth. Such a ſurplus is liable to pay debts upon ſimple contract, which land is not. If this ſurplus be perſonal eſtate in itſelf, the word "real" in the will, cannot alter or change the nature of the eſtate. There is no difference, whether the money ariſes from the ſale of land, or any other way, as long as it is money. The ſurplus of the money ariſing from the ſale of the land, is what is deviſed, and what the reſpondents have by their bill demanded as ſoon as they could. * The election that a court of equity gives the heir, or reſiduary legatee, to have either the money or land, is a conſequence of his being intitled to the ſurplus-money; and therefore to what purpoſe can it ſerve for the land to be ſold, if he will take upon him the diſcharge of debts and legacies, and deſire to have the land? Now therefore, ſince a court of equity gives this election in favour of the heir or reſiduary legatee, it is ſtrange to ſuppoſe, that in the preſent caſe a court of equity ſhould take this election away, and refuſe to decree him the money, when by his bill he deſires it; only becauſe, by act of parliament, he is incapacitated to take the land.

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As to the objection, that at the time of the conveyance it is real eſtate; it may be anſwered, that the reaſon why the land, if not ſold before the death of the anceſtor, ſhall deſcend to the heir at law, or paſs to the reſiduary legatee, is, becauſe it is at his election to chooſe either land or money; but here the heir, or reſiduary legatee, had no ſuch election, which alters the caſe. The

ROPER *againſt* RADCLIFFE. Chancery could not have decreed a papiſt the land though he had deſired it; ſhould it have done ſo, the decree would have been void.

As to the objection, that the land may not be ſold, the anſwer is, that the truſtees by not ſelling will be guilty of a breach of truſt; and as a breach of truſt is never to be preſumed, that cannot authorize a different interpretation. By "profits out of lands," muſt be underſtood continuing profits, and not money ariſing from ſale.

IT WAS REPLIED *for the appellant*, that the reſpondents preferring their bill in equity very ſpeedily, and claiming this as perſonal eſtate, is not * at all to the purpoſe; for they were not obliged to have done it at all. As to the definition of the word "purchaſe," it will extend to deviſe, for to that the agreement of the deviſee is neceſſary, which is an act. *Co. Lit.* 10. *a.* ſpeaking of the ſeveral conveyances of purchaſes, uſes the word in our ſenſe. As to what was ſaid, that to include "deviſe" under the word "purchaſe" in the latter clauſe, would make one part of the act of parliament contradict the other, it may be anſwered, No; for a general ſubſequent clauſe may be reſtrained by a precedent one. The rule that penal laws are not to be interpreted by equity, holds in caſes of laws that are penal upon particular perſons, but not where laws are made for the public good, and the peace and ſafety of the realm; which is the caſe here.

* [242]

Ante, 117.

As for the objection framed from the *Statute De Religioſis*, the true anſwer is, that the power of the church was ſo very great in thoſe days, as might probably have an influence upon the proceedings of WESTMINSTER-HALL; but it is to be hoped now, that there will be no partiality in favour of papiſts, and in prejudice of a proteſtant heir. Property will be very precarious, if a court of chancery can at pleaſure call a real eſtate a perſonal one, or a perſonal a real one.

THE JUDGES being ſummoned to attend and give their opinions, were divided, ſix againſt five; ſix for reverſing, and five for affirming the decree. Had LORD TREVOR been there, and ſtuck to his former opinion, there had been ſix againſt ſix.

THE DECREE was reverſed by a great majority of *the Peers (a)*.

(a) See the caſe of Cornish *v.* Errington, 2. Peer. Wms. 361.

TRINITY

TRINITY TERM,

The Thirteenth of Queen Anne,

IN

The Queen's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir Thomas Powys, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir Robert Raymond, *Knt. Solicitor General.*

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* Miles *againſt* Williams.

Caſe 122.

DEBT UPON BOND was brought againſt the defendant and his wife: They pleaded in bar, that the bond was entered into by the wife *dum ſola*; that a commiſſion of bankruptcy iſſued out againſt the huſband, who in all points conformed himſelf to the ſtatute 4. *Ann.* c. 17. ſ. 7. and ſo both defendants ſay, *quòd vigore* of the ſtatute 4. *Ann.* c. 17. ſ. 7. and other ſtatutes, he became a bankrupt, *per quod* the debt was diſcharged; *et hoc parati ſunt verificare.*

A bond given by the wife *dum ſola* is diſcharged by the bankruptcy of her huſband; but if the bankruptcy be pleaded to an action againſt them on ſuch bond, the plea muſt conclude to *the country*, and not with a *verification*, or it will be bad on a *ſpecial demurrer.*

To this plea the plaintiff demurs ſpecially: becauſe a bond entered into by the wife *dum ſola fuit*, is not diſcharged by the bankruptcy of the huſband; and becauſe they ought to have concluded their plea to *the country.*

* PARKER, *Chief Juſtice*, delivered the reſolution of the Court, that ſuch a debt was a debt within the ſtatute 4. *Ann.* c. 17. ſ. 7. and conſequently that it was diſcharged by the bankruptcy of the huſband. The words of the ſtatute are, "ſhall be diſcharged from "all debts by him, her, or them due and owing at the time that he, "ſhe, or they did become bankrupt." The queſtion therefore will be, Whether this be a debt due and owing at the time of the bank-

S. C. ante, 160.
S. C. 1. Peer. Wms. 249.
S. C. Gilb. 318.

MILLS *against* WILLIAMS.

ruptcy? It has been argued by the bar, and very reaſonably, that if debts due to the bankrupt's wife are aſſignable by the commiſſioners, then it is reaſonable that debts owing by the bankrupt's wife ſhould be diſcharged by the bankruptcy. Now in order to know whether a debt due to the wife of the bankrupt be aſſignable, the intention of the ſtatute 13. *Eliz.* c. 7. and 1. *Jac.* c. 15. muſt be conſidered. By the 1. *Jac.* 1. c. 15. which is explanatory of that of 13. *Eliz.* c. 7. it is provided, "that the commiſſioners "ſhall have power to grant and aſſign, or otherwiſe to order or "diſpoſe all debts due or to be due, to and for the benefit of the "bankrupt, by what perſon or perſons ſoever, or in what manner "and form ſoever, to the uſe of the creditors, &c. and that the "ſaid aſſignment or diſpoſition, &c. ſhall ſo veſt the property, &c. "in the aſſignees as fully, &c. as if the ſaid bill, bond, &c. where-"upon the ſaid debts ſhall ariſe and grow, had been made to, or with, "or for the aſſignees." Now the intention of this act of parliament is plainly this, that the bankrupt being not thought a proper perſon to be intruſted with the management of his own eſtate, for fear he ſhould defraud his creditors, the act puts the commiſſioners in the place and ſtead of the bankrupt, and conſequently whatever eſtate
*[245] the huſband can turn into money, in order to pay * his debts, the ſame is aſſignable by the commiſſioners. The beſt way of interpreting ſtatutes, is by the rules of common law in like caſes. Thus the ſtatute *De Donis*, which ſays, "that a fine levied of en-"tailed lands ſhall be *ipſo jure nullus*," has been interpreted (*a*) not to make *a nullity*, but *a diſcontinuance*; becauſe at the common law, if a biſhop ſeiſed in right of his church, or a huſband of his wife, had aliened by fine, &c. it was but a diſcontinuance. If a bond be entered into to two, and one grants the bond to the king, the king may ſue alone (*b*). It is the conſtant practice in outlawry to ſeize all the debts due to the wife, and yet the words of the writ "*bona et catalla terras et tenementa* of the perſon out-"lawed," are rather weaker than the words of the ſtatute. The caſe of *Breadman v. Coales* (*c*) is a ſtrong caſe; for it proves that the huſband may aſſign a debt due to his wife, by the common law; and that he was not reſtrained by the ſtatute 7. *Jac.* 1. c. 15. "becauſe," ſays the book, "it was the huſband's own debt," which brings it within the very words of the fourth of the Queen. It is certainly a very equitable interpretation, that whatever may be applied by the bankrupt to the payment of debts, may be aſſignable by the commiſſioners. The contrary opinion, that it is not aſſignable, promotes no good end in the world. To the objection, that the ſtatute does not extend to debts due to the bankrupt as adminiſtrator or executor, it may be anſwered, that it is nothing to the purpoſe, for he has no intereſt in thoſe debts to his own uſe,
*[246] and when he recovers them they are aſſets, &c. * But it is objected, that this ſtatute extends not to debts due to him and ano-

(*a*) 3. Co. 85.
(*b*) Year-Book 21. *Hen.* 7. fo. 19.
(*c*) Hob. 253.

ther

ther; and for this purpoſe 1. *Levinz*, 17. is quoted. To this I anſwer, that there is no judgment in that caſe, and that I doubt whether it be certain, that the whole debt is not veſted in the crown, upon the outlawry of one, where there are two obligees. That a debt due from the bankrupt and another is within the act, appears from the ſtatute 10. *Ann.* c. 5. a declaratory law: but this is his debt, as he is one with his wife. Another objection has been taken, that this debt ſhall ſurvive to the wife if the huſband die before he recover it, and this conſtruction will deprive her of this contingency; but the anſwer is, that the huſband might by his releaſe have diſcharged this debt; now this is a diſcharge of the legiſlature, applied in eaſe of his debts. The aſſignee has the ſame remedy to recover it, that the bankrupt himſelf had. If a note be payable to a *feme ſole*, or order, and ſhe afterwards marries, her huſband is the proper perſon to indorſe this note. Now, that this debt due from the wife is diſcharged by the bankruptcy, ſeems to me to be clearer than that a debt to the wife ſhould be aſſignable, &c. for this conſtruction makes for the benefit and intereſt of the bankrupt, the creditors, and the wife. As to the bankrupt, nothing can be harder than that he ſhould be ſtripped of every thing, forced upon oath, and at the peril of felony, to make a full diſcovery, and yet after all, not to be diſcharged. It is the intention of the *capias*, only, that the love of liberty ſhould oblige to a full diſcovery. * The diſcharge of the bankrupt ſtands upon this reaſon, that he is ſtripped of every thing that ſhould enable him to pay. This reaſon holds equally to all the debts for which he may be ſued. This expoſition is better likewiſe for the creditors; for if this debt be diſcharged, then is a creditor of the wife a creditor within the ſtatute, and to come in for an equal proportion; which is far more eligible than an action, which is good for nothing unleſs the wife ſurvive, and perhaps not then neither. As to the wife, that this expoſition is beneficial to her, is ſo plain, that it has been urged as an objection that it will be too beneficial. Whether this be a temporary diſcharge during the coverture, or a perpetual one, is not now a queſtion; but I am inclined to think it a perpetual one: nor is this unreaſonable, for the law looks upon the debt as paid, ſince the creditor is let into the common fund. As to the objection, that this may be a fortune to a woman; it is very reaſonable, that ſhe ſhould ſhare in the advantages as well as diſadvantages of the bankruptcy. If a ſuppoſition be made, that a woman may, precedent to her marriage, put her eſtate into the hands of truſtees, for her ſeparate maintenance, and ſo her debts will be diſcharged by the bankruptcy, and her eſtate out of the reach of the creditors; the anſwer is, No; for I am of opinion that ſuch a ſettlement or conveyance, *quoad* the creditors, ſhall be deemed void and fraudulent. As to the objection, that this diſcharge is a perſonal privilege, and therefore not communicable to the wife, the anſwer is, that her diſcharge is neceſſarily conſequential upon his (*a*).

Miles *againſt* Williams.

* [247]

(*a*) See Boſvil *v.* Brander, 1. Peer. Wms. 460. Saddlington *v.* Kinſman, 1. Bro. C. C. 44.

The

THE QUEEN *againſt* SIMPSON.

moned, which ſurely is ſufficient; for it would be abſurd that he ſhall take advantage of his own contempt.

Adjournatur (*a*).

(*a*) This caſe was argued a ſecond time in Michaelmas Term 3. *Geo.* 1. poſt. 341.; and in the Hilary Term following PARKER, *Chief Juſtice*, delivered the reſolution of the Court, that the conviction was good. S. C. poſt. 378.

* [251]

Caſe 124.

* Cole *againſt* Hawkins.

If to an *aſſumpſit* on 16 *Jan.* 1706 the ſtatute of Limitations be pleaded; a replication ſtating a bill exhibited on 23 *Jan.* 1713, and that the cauſe of action aroſe within ſix years, is good on a general demurrer.

S. C. poſt. 348.
S. C. Gilb. 279.
S. C. 1. Stra. 21.
Salk. 222.
2. Stra. 806.

ASSUMPSIT.—The plaintiff declares upon a promiſe the ſixteenth of *January* 1706. The defendant pleads in bar the ſtatute of Limitations. The plaintiff replies, that the bill was exhibited the twenty-third of *January* 1713, and that *cauſa actionis accrevit infra ſex annos*. To this the defendant demurs.

MR. BRANTHWAYT *for the defendant* inſiſted, that this replication was *a departure* from his declaration; for though in tranſitory actions time and place are not material, and the jury may, notwithſtanding the promiſe was at a different time or place, find for the plaintiff, yet the plaintiff ſhall not be at liberty himſelf to vary from or falſify his own record (*a*).

MR. SALKELD *for the plaintiff* argued, that *a departure* was always a going off from ſomething material, that had been alledged before; and not from things immaterial. Now in tranſitory actions, time and place are not material; upon iſſue they are certainly immaterial. By the common law, time was ſo far material, that the time in the declaration muſt not be ſubſequent to the bringing of the action. In *Pollard's Caſe* (*b*) it is agreed, that if treſpaſs be brought againſt two defendants, and one of them die *ante impetrationem brevis*, the action abates, but it is otherwiſe if pleaded that one of them died afterwards. The caſe of *Lee v. Raynes* (*c*), he ſaid, was miſ-reported; for he had in his hand a manuſcript * report of that caſe, of Lord Chief Juſtice KEYLING, wherein it appeared, that the opinion of the Court in that caſe was, that the ſtatute of Limitations does not take away the liberty of laying the action at any time; and therefore, if the defendant make the time material by pleading the ſtatute, the plaintiff may follow him by varying from the time ſet forth in the declaration, provided it be not a time ſubſequent to the declaration. And this caſe is cited to this very purpoſe in 1. *Keble*, 799. In the caſe of *Webley v. Palmer* (*d*), a difference is taken between debt on bond and treſpaſs; in action of debt upon bond, the plaintiff ſhall not in his replication vary from the date of his bond in his declaration; but in treſpaſs, the plaintiff may vary from the day if the defendant neceſſitates him.

* [252]

(*a*) Year-Book 5. *Hen.* 7. pl. 28. Book of Aſſizes, 22. pl. 86. Cro. Car. 228. Cro. Jac. 364. 3. Lev. 348. Tyler *v.* Wall, Raym. 86.

(*b*) Plowd 90.

(*c*) Ray. 86. 1. Lev. 110.

(*d*) Michaelmas Term, 7. *Will.* 3. in *B. R.* Salk. 222.

PARKER,

COLE *againſt* HAWKINS.

PARKER, *Chief Juſtice.* Time is material, if ſubſequent to the declaration; time is material, if the defendant anſwer to the time; time is material upon the ſtatute of Limitations. As the matter ſtands upon the pleading, the plaintiff in his replication ſhews, that his bill was exhibited ſeven years after the cauſe of action. Now this being a general demurrer, it ſtands by virtue of the ſtatute for the amendment of the law (*a*), as if there had been a verdict; ſo that it muſt be conſidered, whether this be a matter of form or ſubſtance.

POWYS *ſenior, Juſtice.* Time here is material upon the ſtatute of Limitations: not probable to lay it in the declaration ſo many years ago, unleſs the fact was ſo: moſt commonly, people lay their cauſe of action at a later time than it really was.

POWYS *junior, Juſtice.* In tranſitory actions time and place muſt be laid for form's ſake, as to the defendant and *jury; for the jury are not bound by it, and the defendant cannot traverſe it without a ſpecial juſtification. The plaintiff indeed in his replication has verified the plea of the defendant. He has now fixed both the boundaries; in his declaration he has ſhewn the time of the cauſe of his action, in his replication the time when his bill was exhibited. And yet if inſtead of a demurrer iſſue had been joined, the jury might have found for the plaintiff, if in fact his cauſe of action was within ſix years. It is to be conſidered therefore, upon the ſtatute for the amendment of the law, whether this not being a ſpecial demurrer, the fault in the pleading is not now cured.

* [253]

PARKER, *Chief Juſtice.* This may be conſidered likewiſe, that notwithſtanding that ſtatute, it does not follow that judgment muſt upon this general demurrer be given for the plaintiff, becauſe upon a verdict for the plaintiff it would have been ſo; and that for this reaſon, becauſe upon a verdict for the plaintiff a new fact is laid before the Court, *viz.* that the cauſe of action did ariſe within ſix years.

Adjournatur (b).

(*a*) 4. *Ann.* c. 16.

(*b*) In Hilary Term, 3. *Geo.* 1. judgment was given for the plaintiff. Poſt. 348.

Walter *againſt* Laughton.

Caſe 125.

THIS was an action *qui tam*; and the objection was, that the concluſion was "*et inde producit ſectam*" (*a*) generally; and not "*tam pro domina regina, quàm pro ſeipſo.*"

A declaration on a penal ſtatute concluding *et inde, &c.* ſhall be intended *tam pro, &c.*

BUT IT WAS RESOLVED that this muſt be ſo underſtood; and precedents being both ways,

Judgment *reſpondeas ouſter* was awarded.

(*a*) Anciently, "*inde producit ſectam,*" was producing witneſſes. 17. *Edw.* 3. 48. Fleta, lib. 2. cap. 62. ſect. 2. cap. 63. ſect. 9, 10, 11. 5. *Edw.* 3. 171. 10. *Edw.* 2. 291.—NOTE *to the former edition.*

Johnſon

Caſe 126.

* Johnſon *againſt* Gardiner.

If an executor promiſe to pay a debt of the teſtator's at a future time, in conſideration of forbearance, and be ſued for it *as executor*, the ſtatements as executor are *ſurpluſage*.

THIS was A WRIT OF ERROR out of the court of common pleas.

FOR PLAINTIFF IN ERROR *it was inſiſted*,

FIRST, That the declaration was naught, becauſe it was an action brought againſt the defendant, *as executor*, upon a promiſe made by the executor *poſt mortem teſtatoris*, *viz.* that whereas the teſtator was indebted to the plaintiff in *March* for goods ſold and delivered, he promiſed to pay upon the twenty-third of *November*. Now this promiſe of the executor being founded plainly upon the conſideration of forbearance, made it the contract of the executor; and therefore the action ſhould have been brought againſt him in his own name.

IT WAS REPLIED *for the plaintiff in error*, that the conſideration was not the forbearance, but the old debt, the debt of the teſtator's; and that the promiſing to pay it barely upon a future day, will not make a new conſideration.

TO THIS *it was anſwered*, that though the defendant is named executor, yet it appears by the declaration, that the executor is chargeable upon his own contract, and the bare naming him executor *non nocet*. It is always ſuppoſed, where there are promiſes of payment upon ſuch conſiderations, that the executor has aſſets, and therefore it is not neceſſary to aver his having aſſets; for unleſs he had, there was no occaſion for ſuch a promiſe (*a*).

If a defendant be improperly named *executor* in the declaration, judgment *de bonis propriis* is good.

SECONDLY, But ſuppoſing the action well brought againſt him *as executor*, then the judgment was wrong, being *de bonis propriis*, inſtead of *de bonis teſtatoris*.

TO THIS *it was anſwered*, that upon an *aſſumpſit* by an executor, judgment is always *de bonis propriis*; for it is all one as if the executor had given a bond for the money (*b*).

* [255] * SECONDLY, In the caſe of *Collins v. Thoroughgood* (*c*) judgment *de bonis teſtatoris* was given in covenant, though non-repair was in the time of the executor.

PARKER, *Chief Juſtice*. The naming him executor is ſurpluſage; becauſe it appears upon the face of the record, that the demand was a demand againſt him upon his own contract. In effect the forbearance is the conſideration of this promiſe; becauſe without forbearance no advantage can be taken of this promiſe (*d*).

And to this opinion the reſt of the Court inclined.

Sed adjournatur.

(*a*) Cro. Jac. 602. 613. And ſee Pearſon *v.* Henry, 5. Term Rep. 6. that a promiſe by an executor, if he has no aſſets, is *nudum pactum*.

(*b*) 9. Co. 93. Cro. Eliz. 91. 406 — But the goods of the teſtator in the hands of his executor, cannot be ſeized in execution of a judgment againſt the executor in his own right. Farr *v.* Newman, 4. Term Rep. 621.

(*c*) Hob. 188.

(*d*) Yard *v.* Ellard, Salk. 117.

Parker

Parker *againſt* Crook.

Caſe 127.

THIS was an action of covenant upon a deed indented. It was objected to the declaration, that the defendant is ſaid in the declaration to continue at "*Fort St. George in Indibus Orientali-*"*bus*;" and upon *oyer* of the deed, it bears date at *Fort St. George*; and therefore the Court, as was pretended, had no juriſdiction (*a*).

An action lies on a deed dated at *Fort St. George* in the *Eaſt Indies*; but in the declaration a place in *England* muſt be laid as *a venue*.

Salk. 659, 660.

PARKER, *Chief Juſtice.* An action will lie in *England* upon a deed dated in foreign parts, or elſe the party can have no remedy; but then in the declaration a place in *England* muſt be alledged *pro formâ* (*b*). Generally ſpeaking, the deed, upon the *oyer* of it, muſt be conſiſtent with the declaration; but in theſe caſes, *propter neceſſitatem*, if the inconſiſtency be as little as poſſible, it is not to be regarded; as here the contract being of a voyage to be performed from *Fort St. George* to *Great Britain*, imports that *Fort St. George* is different from *Great Britain*.

Afterwards in *Hilary Term*, the plaintiff had his judgment, notwithſtanding this objection (*c*).

(*a*) Latch, 4. Lutw. 950.

(*b*) See the caſe of Fabrigas *v.* Moſtyn, Cowp. 161.

(*c*) The words "*in Indibus Orien-*"*talibus*" do not neceſſarily import the place to be out of *England*; there is a place called *Holland* in *Lincolnſhire*; and there may be a *Fort St. George* in the pariſh of *St. Martin's*. In the caſe of Ward *v.* Kedſgrove, W. Jones, 69. the ſame objection taken and over-ruled.—NOTE *to former edition.*

MICHAELMAS

MICHAELMAS TERM,

The Firſt of George the Firſt,

IN

The King's Bench.

Thomas *Lord* Parker, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Pratt, *Knt.*
} *Juſtices.*

Sir Edward Northey, *Knt. Attorney General.*

Nicholas Lechmere, *Eſq. Solicitor General.*

Vincent *againſt* Atwood.

Caſe 128.

A SCIRE FACIAS was brought againſt bail. The defendant pleaded, that the principal died before the return of the *capias ad ſatisfaciendum.* The plaintiff replied, that the principal did not die before the return of the *capias ad ſatisfaciendum.* The defendant demurred.

To a *ſcire facias* againſt bail, if the defendant plead the death of the principal before the return of the *capias*; A REPLICATION that the principal did not die before the return of the *capias* is good upon demurrer.

AGAR, *for the defendant*, argued, that the replication was naught:

FIRST, Becauſe the plaintiff has not ſet forth that there was any *capias* at all ſued out; but only that the principal did not die before the return of the *capias.*

*SECONDLY, Becauſe by this replication there is an iſſue formed, wherein the jury muſt at once try matter of law, matter of record, and matter of fact.

*[257]

BRANTHWAITE *for the plaintiff.*

When the defendant pleads, that the principal died before the return of the *capias*, he certainly admits, that there was a *capias* ſued out; and the only thing doubted is the death of the principal, &c. It is only neceſſary for the plaintiff to anſwer the defendant's plea, and not to ſet forth that which is admitted by the defendant. In a *ſcire facias*, it is not neceſſary to ſet forth the awarding of a

VINCENT *against* AYWOOD.

capias (*a*). The condition of a bond was, that *H.* ſhould marry the daughter of *D.* before *Eaſter*; and in debt brought upon this bond, it was held (*b*), that if the defendant pleads that the daughter died before *Eaſter*, it is enough for the plaintiff to ſay in his replication, that ſhe did not die before *Eaſter*, without ſetting forth that he did not marry her. The reaſon is, becauſe the not marrying is a fact admitted; and the other the only point in queſtion. Had the plaintiff replied that there was a *capias* ſued out, and the defendant had rejoined "*nul tiel record*," the rejoinder would have been *a departure* from his bar. How then can it in reaſon be neceſſary for the plaintiff in his replication to ſet forth that which the defendant cannot deny in his rejoinder without a departure? In the caſe of *Perkins v. Woolaſton* (*c*), in an action of debt againſt bail, the defendant pleaded *no capias*; the plaintiff replied, there was a *capias*; the defendant rejoined, that the force of the *capias* was ſuſpended by a writ of error; and it was reſolved, that this rejoinder was *a departure* from the bar.

Judgment *niſi* was given for the plaintiff (*d*).

(*a*) Cro. Jac. 97. Lutw. 1284.
(*b*) Yelv. 24.
(*c*) 6. Mod. 139.
(*d*) See Chandler *v.* Roberts and Another, Bail of White, Dougl. 61. Henderſon *v.* Withy, 2. Term Rep. 576.

* [258]

Caſe 129.

* The Queen *againſt* Aires.

Scire facias to repeal letters patents is not abated by the death of the king.
S. C. poſt. 354.
S. C. 1. Stra. 43.

A SCIRE FACIAS was brought by the late queen, to repeal her own letters patents, whereby ſhe had granted ſome fairs to *Thomas Aires*, in the town of *Winſter*, in the county of *Derby*.

The *ſcire facias* ſet forth, that precedent to the grant of the fairs a writ of *ad quod damnum* iſſued out; but that it was clandeſtinely executed, ſo that the jury found that the grant was not *ad damnum* of any-body; when it was *ad grave damnum* of *the Earl of Rutland*, who had fairs in the manor of *Bakewell*, four miles diſtant.

The defendant, *proteſtando* that it was not clandeſtinely and fraudulently executed, pleaded, that the grant of the fairs to him was not *ad damnum* of the *Earl of Rutland*, or any-body whatſoever.

Upon this iſſue was joined in chancery.

A *venire* was awarded out of that court, returnable into the court of king's bench, and the court of king's bench awarded a *diſtringas*; upon which the cauſe was tried; and the jury found, that it was *ad grave damnum* of *the Earl of Rutland*.

MR. SALKELD moved in arreſt of judgment,

FIRST, That the *ſcire facias* was abated by the death of THE QUEEN. By the common law, there is no difference between the king and the ſubject; but the death of the plaintiff had in both caſes

THE QUEEN *againſt* AIRES.

caſes abated the ſuit. Indeed, were this an original writ, it would be helped by the ſtatute 1. *Anne*, c. 8. but being a judicial writ, it is not. In the caſe of *Sir Oliver Butler (a)* it was held, that a *ſcire facias* is a judicial writ.

* NORTHEY, *Attorney General*, anſwered, that this was not a judicial but an original writ; that judicial writs are thoſe only that are founded upon judgment and judicial proceſs; but that this was no conſequence of any judicial proceeding, or founded upon the former letters patent, but purely the fraud; and that there are many *ſcire facias's* in *the Regiſter*, among the original writs (*b*). * [259]

If on a *ſcire facias* to repeal a patent, iſſue be joined in chancery, that court may award a *venire*.

THE SECOND EXCEPTION was, that upon iſſue joined the court of chancery (not being a proper court for trial of a matter of fact) is at a full ſtand, and the court of king's bench ought to have awarded the *venire*; whereas here the *venire* is awarded by the court of chancery, returnable into the court of king's bench. And the caſe of *Martin v. Blackſton (c)* was cited.

TO THIS EXCEPTION *it was anſwered*, that the conſtant practice is, for the chancery to award the *venire facias*, returnable into the court of king's bench. So is the caſe of *Jeffreſon v. Morton and Dawſon (d)*, and *Sir George Reynel's Caſe (e)*. And the caſe of *Martin v. Blackſton*, as reported in *W. Jones*, 82. does not make againſt it. 9. Co. 99. a.

THE COURT. There is no other way to give day in this court but by awarding a *venire* out of chancery returnable here; and it is always done ſo.

A *ſcire facias* to repeal a charter to hold fairs, ſtating, that they are four miles diſtant, is ſufficient.

THE THIRD EXCEPTION was, that the fairs granted to *Mr. Aires* were four; one upon *June* the twenty-third, another *October* the ſeventeenth, a third *November* the twenty-eighth, another *April* the twelfth: thoſe granted to *the Earl of Rutland* were upon *March* the twenty-ninth, *May* the ſeventeenth, and *Auguſt* the twenty-fifth. It appears plainly that the days are very different; and, for aught appears upon the record, the places where theſe fairs are to be held may be forty miles diſtant; for the record ſays only, "that they are four miles diſtant," but does not add, "and no more." * Now it was ſaid, that it was not to be preſumed, that where time and place are ſo different, the one ſet of fairs could be prejudicial to the other. * [260]

THE ATTORNEY GENERAL replied, that time and place were matters of evidence for the jury, not the Court, to conſider of; that damage or no damage very often depended upon different circumſtances; and that it was poſſible for a market to be held on the ſame day, and cloſe by another, without prejudice; as in *London*. Dyer, 276. Sir Oliver Butler's Caſe, 3. Lev. 220.

(*a*) 3. Lev. 220.

(*b*) The Court were all of opinion, that this was helped by the ſtatute of the 1. *Anne*, c. 8. S. C. poſt. 355.

(*c*) Palm. 410. S. C. W. Jones, 82.

(*d*) 2. Saund. 6. 23.

(*e*)

A *ſcire facias* held to be a writ of right, where the patent is prejudicial to the ſubject.

THE FOURTH EXCEPTION was, that a *ſcire facias* was not the proper remedy; but that it ſhould have been by *action on the caſe*, to have recovered in damages.

THE ATTORNEY GENERAL, in anſwer to this exception, cited, *Dyer*, 197, 198. 11. *Co. Rep.* 74. 8. *Rep. Prince's Caſe*, *Fitzherbert*, *tit.* "*Brief*," 651. 2. *Vent.* 344. *Sir Oliver Butler's Caſe*, 3. *Lev.* 220. where it is held, that the crown *de jure* ought to ſuffer the ſubject to uſe their name.

Title to a fair.

THE FIFTH EXCEPTION was, that the *Earl of Rutland* had not ſet forth a ſufficient title to the fair, by alledging it to be appendant to a manor.

The king's bench may give judgment on an iſſue out of chancery.

THE SIXTH EXCEPTION was, that being an iſſue out of chancery, and ſent to the common law only for trial, the record ought to be remitted into chancery, and judgment given there, and not here. *Raym.* 178.

But THE COURT ſaid, this point had been ſo firmly ſettled, in the caſe of *Jeffreſon* (*a*), that they would not ſuffer it to be debated.

Adjournatur. To be ſet down in the paper (*b*).

* [261] (*a*) 2. Saund. 26. (*b*) In Hilary Term, 3. *Geo.* 1. judgment was given for the king.

Caſe 130. * The Pariſh of Pawlet *againſt* The Pariſh of Burnham.

Actual ſervice for a year, as well as hiring for a year, are neceſſary to make a ſettlement.

A COVENANT SERVANT FOR A YEAR, at the rate of three pounds a-year wages, left his maſter by conſent, three weeks ſhort of a year; his maſter deducting ſix ſhillings for the three weeks out of his wages. By order of two juſtices it was adjudged a good ſettlement.

S. C. Foley, 206. S. C. 1. Seſſ. Caſes, 77.

Upon an appeal to the ſeſſions, the Court being divided, the order of the juſtices was confirmed, and a caſe ſtated ſpecially; which being removed by *certiorari*,

IT WAS URGED *in ſupport of the order*:

FIRST, That it being ſet forth in the order, that he was a covenant ſervant, it muſt be intended a covenant in writing; for the law knows nothing of a parol covenant; if ſo, the covenant could not be diſcharged by parol; and conſequently, in point of law, he continued a ſervant to the end of the year.

SECONDLY, It was ſaid, that his departure but three weeks before the end of the year ſhews it to have been a fraud, contrived to prevent a ſettlement.

THE COURT quaſhed the order; and held actual ſervice for a year neceſſary.

(*a*) See Rex v. Preſton, 2. Conſt, 497. Rex v. Caſtlechurch, Burr. S. C. 68. Rex v. Goodneſtone, 2. Burr. S. C. 251. Hawking v. Eaſtbrooke, 2. Conſt, 502. Rex v. Nether Heyford, Burr. S. C. 479. Rex v. Frome Selwood, Burr. S. C. 565. Rex v. Bray, Burr. S. C. 682. Rex v. Potter Heigham, Burr. S. C. 690. Rex v. St. Bartholomew, Cald. 48. Rex v. Sulgrave, 2. Term Rep. 376. Rex v. Kenilworth, 2. Term Rep. 598.

Clerk

Clerk *againſt* Lee. Caſe 131.

MARY CLERK being proſecuted in the ſpiritual court, by A PROCTOR, for his fees, in a ſuit brought by her againſt her then huſband *Young*, to be divorced, prayed *a prohibition*; ſuggeſting,

A libel in the ſpiritual court againſt a woman divorced, for the expences of ſuch divorce, muſt be againſt her as a *feme ſole*.

FIRST, That ſhe was *a feme-covert*; and as ſuch not liable to be ſued ſingly to pay the fees.

SECONDLY, that all actions upon the caſe are ſuable at common law, *et non alibi*.

* [262]

* SALKELD ſhewed cauſe why a prohibition ſhould not go.

FIRST, As to her being a *feme covert*, he inſiſted, that it was now too late for her to take advantage of it, becauſe it had not been pleaded in the ſpiritual court.—And, that after a ſentence of divorce, the wife ſtands in the capacity of a ſingle woman, and has a property diſtinct from her huſband.

MR. DARNELL anſwered, that it was very true, that after a ſentence of divorce huſband and wife are to be conſidered as ſingle perſons; but that here there was no ſentence of divorce, but the marriage declared to be null and void.—And, that her marriage to *Clerk* was precedent to the proctor's ſuit for his fees, in that ſuit where the marriage between her and *Young* was declared null.

See Elliah v. Leigh, 5. Term Rep. 679.

But this point was thrown out of the caſe, it appearing, that the libel was brought againſt her not as *a feme ſole*, but againſt her and her huſband *Clerk*.

PARKER, *Chief Juſtice*. If the ſpiritual court has juriſdiction, perhaps it is not neceſſary, by the forms of their law, for the huſband to be named in the ſuit; as in the caſe of an executrix. And the reaſon of the difference between the common law and the civil law is this, that in the ſpiritual court the huſband, though not named, may come in *pro intereſſe ſuo*, and make defence himſelf, ſhould the wife deſert the cauſe. Whether therefore the huſband muſt be joined muſt be determined by the ſpiritual law, and may be a good cauſe for an appeal, but can be none for a prohibition.

THE SINGLE QUESTION then was, Whether *a proctor* may not ſue in the ſpiritual court for his fees.

A proctor cannot ſue in the ſpiritual court for his fees.

MR. SALKELD argued, that he might, both from the authorities on this ſubject, and from the reaſon of the thing.—As to the authorities. In the caſe of *Horton v. Wilſon* (*a*) it is held, that a proctor may ſue in the ſpiritual court for his fees; and the reaſon given is, that fees are due by provincial conſtitutions. In a caſe in *Ventris* (*b*) it is ſaid, that if the cuſtom be denied, then a prohibition muſt go; but not otherwiſe. So alſo in the caſe of *Doyley v. Dod* (*c*) it is held, that if the cuſtom be denied, a prohibition muſt go;

(*a*) 1. Mod. 167. S. C. 3. Keb. 203. S. C. 3. Freem. 129.
(*b*) Anonymous, 1. Vent. 165.
(*c*) 2. Keb. 810. 845.

CLERK *against* LEE.

non aliter; and ſaid, that the juriſdiction extended as much *to fees as to coſts*. In the caſe of *Webb v. Hartfel* (*a*), HALE, *Chief Juſtice*, ſays, that no action on the caſe was ever brought for ſuch fees, and therefore they may be ſued for in the ſpiritual court.— As to the reaſon of the thing. Fees are nothing but wages for work done in a ſpiritual court, by a ſpiritual officer, in a ſuit of
* [263] ſpiritual conuſance. * A proctor is as much an officer of the ſpiritual court as an attorney of a court at common law. The ſpiritual court is an ancient court, and has ancient officers belonging to it to carry on the buſineſs, and to preſerve the honour of the court; but it is impoſſible that theſe ends can be attained while the court is bereaved of the attendance of its officers. A proctor is compellable by law to ſerve in his employment (*b*). In *Co. Lit.* (*c*) it is held, that an attorney is ſo too: conſequently the attendance of neither of them ought to be hindered, by obliging them to ſue for their fees in foreign courts. By the ſtatute of 5. *Eliz.* c. 4. juſtices of the peace have power to compel men to ſerve in huſbandry; in which ſtatute there is no expreſs clauſe whereby the juſtices are enabled to redreſs ſuch ſervants, in caſe their wages are denied; yet it is held, by the equity of the ſtatute, that ſince the juſtices have a power to compel their ſervice, they ſhould likewiſe have a power to give them redreſs as to their wages (*d*). All courts have proper fees belonging to their reſpective officers; of which fees each court is moſt certainly the propereſt judge (*e*). The ſpiritual court has juriſdiction to try extortion in taking fees (*f*).

Salk. 330. 333. DARNELL *for the prohibition.* As to the caſes quoted; *non negandum* but there have been reſolutions that way; but the point is now ſettled, in the caſe of *Johnſon v. Oxendon* (*g*), where moſt of the caſes now quoted are taken notice of; and this reaſon given by *Chief Juſtice* HOLT, that if proctors might ſue in the ſpiritual court for their fees, they would avoid the ſtatute of Limitations. In the caſe of *Brioker v. Goodall* (*h*), a prohibition was granted,
* [264] where a woman was ſued for fees, in a cauſe * carried on by her againſt her huſband, in order to bring the matter judicially before the court. As to the caſe of extortion, no weight is to be laid upon it, becauſe no favour is ſhewn to ſo odious a crime. As to the arguments from the reaſon of the thing; if they prove anything they prove too much, *viz.* that a proctor cannot ſue at common law.

PARKER, *Chief Juſtice.* Whether the fees may be ſued for in the ſpiritual court, is a matter much litigated; and there are reſolutions both ways.

(*a*) 3. Keb. 516.
(*b*) Michaelmas Term, 8. *Will.* 3. —See Salk. 86.
(*c*) Co. Lit. 195.—See Salk. 86.
(*d*) Salk. 441. Stra. 1002.
(*e*) Ld. Ray. 149.
(*f*) 2. Keb. 615.
(*g*) 4. Mod. 254.
(*h*)

EYRE,

EYRE, *Juſtice.* There is no ſuing in the court of admiralty or court of honour for fees. In the caſe of *Donvill v. Oldiſh* (*a*), a prohibition was granted by all the Judges of *England.* CLERK *againſt* LEE.

PRATT, *Juſtice.* I ſee no reaſon why fees in the ſpiritual court may not be recovered at *common law*, as well as fees in chancery.

Adjournatur (*b*).

(*a*) Shower's Caſes Parl. 58.
(*b*) See Pollard *v.* Gerrard, 1. Ld. Ray. 703. and 2. Stra. 1108. Dougl. 629.

* [265]

* Potter *againſt* Pinkney. Caſe 132.

TO AN ACTION OF TRESPASS for goods taken and carried away, the defendant pleaded, that he was ſeiſed of ſuch a leaſe; but in conveying his title to the leaſe, ſet forth ſuch matter as ſhewed the leaſe to have determined before it began; then goes on, and ſays, that *virtute* of ſuch a leaſe he entered and made a leaſe to the plaintiff, reſerving ſuch rent; and for the rent behind juſtifies the taking, &c. The plaintiff replied, that the goods diſtrained were ſold. The defendant, in his rejoinder, juſtified the ſale, by virtue of the ſtatute 2. *Will. & Mary*, c. 5.. To this rejoinder plaintiff demurred; and the defendant joined in demurrer.

If in treſpaſs for taking a diſtreſs, the defendant juſtifies under a void leaſe, a replication that the diſtreſs was ſold or abuſed, admits the leaſe to be good.

BRANTHWAITE *for the plaintiff*, That there was no good title ſet forth to the leaſe in the plea, but matter directly deſtroying it; and that the firſt leaſe failing, the ſecond muſt do ſo too.

SALKELD *for the defendant*, That if the defendant has failed in deriving to himſelf a lawful ability to make the leaſe to the plaintiff, the conſequence will only be, that that entry, which he ſets forth to be *virtute* of the leaſe, muſt be taken to be *a diſſeiſin*, and a tortious fee-ſimple ſufficient to ſupport the leaſe.

IT WAS ALSO SAID *for the defendant*, That the plaintiff by his replication, though he had not ſaid *bene et verum eſt* the defendant made ſuch a leaſe, &c. yet by pleading ſuch matter as abuſe of the diſtreſs (matter confeſſing and avoiding the plea of the defendant), that plea muſt now be taken for true; as that there was ſuch a leaſe made, and the rent behind.

And of this opinion were the Court.

*PARKER, *Chief Juſtice*, alſo ſaid, that the title was but matter of conveyance or inducement; that the ſubſtance of the plea was the leaſe, and the arrearages of rent.

* [266]

BRANTHWAITE *for the plaintiff* then took exceptions to the rejoinder.

The notice of making the diſtreſs need not be given to the *owner* of the goods, but to the leſſee.

FIRST, That notice ſhould have been given to the owner of the goods; not to the leſſee.

But THE COURT over-ruled this objection; for they held, that the ſtatute did not require notice to be given to the owner, for he might not be known but to the leſſee.

Notice of diſtreſs muſt be in writing.

SECONDLY, That notice in the ſtatute muſt be underſtood to be notice in writing; and that it was not ſet forth in the pleading that this was notice in writing.

BRANTHWAITE *for the defendant* ſaid, that if the word "notice" did in the act import notice in writing, it muſt do ſo too in the plea, which purſued the very words of the act.

In juſtifying a diſtreſs, the cauſe of it muſt be ſhewn.

THIRDLY, It is ſaid in the pleading, *quòd immediatè poſt diſtrictionem ſic captam*, he left notice of taking, &c. *et pro cauſâ inde*; whereas the cauſe ſhould have been ſet forth.

THE COURT held this objection fatal, for that it was direct nonſenſe; and that if it had been *cum cauſâ*, though that had been ſenſe, yet it had been inſufficient; for the Court ought to be informed upon the pleading what the cauſe was that was left.

Judgment was given for the plaintiff.

* [267]

Caſe 133.

* Weddall *againſt* The Manucaptors of Jocar.

To a *ſcire facias* on a recognizance againſt bail, A PLEA that the plaintiff died before the *capias* was iſſued, is good on demurrer.

S. C. poſt. 303.

AN ACTION was brought in the court of king's bench; and a recognizance entered into by the bail, to render the body of the principal, or pay the condemnation; and judgment was given againſt the principal for one hundred and five pounds for damages and coſts. A writ of error was brought into the exchequer-chamber, where the judgment was affirmed, and nine pounds additional coſts given for the delay, &c.

A SCIRE FACIAS was brought againſt the bail upon this recognizance. The bail prayed *oyer* of the recognizance, which is ſet forth, &c. And then the bail pleaded the death of the principal *ante emanationem brevis*. To this plea the plaintiff demurred, becauſe *duplex placitum, et carens forma*.

MR. FORTESCUE *for the plaintiff* inſiſted, that this plea was naught, becauſe it was impoſſible for any material iſſue to be joined upon it. For though if the jury find the death of the principal at the time of the *capias* iſſuing out, it would make all right, ſince he that died before the iſſuing out of the *capias* died certainly before the return of it; yet ſhould the jury find the contrary, that he did not die before the iſſuing, &c. what is the plaintiff the better? ſince he might be alive at the iſſuing out of the *capias*, and dead at the return. Now ſhall a plaintiff be compelled to take iſſue upon a matter which, if found againſt him, he is gone; but if found for him, he is never the nearer? This is the very caſe of debt upon bond, and *ſolvit ante diem* pleaded. In the caſes of *Atwood v. Coleman (a)*, and *Meril v. Joſſelyn (b)*, it was held, that in ſuch caſes there is no way for the plaintiff to help himſelf but by demurrer.

(a)

(b) Ante, 147.

BRANTHWAITE

WEDDALL *againſt* MANUCAP-TORS OF JOCAR.

* BRANTHWAITE *for the defendant.* The condition of the bail-bond is either to render, &c. or pay the condemnation. It is to be conſidered what pleas are good and proper for the bail. Firſt, The condition of the recognizance being in the disjunctive, he may plead the performance of either part of the disjunctive. Secondly, By way of excuſe for not performing, he may plead the death of the principal before any *capias* iſſued out, or the death of the principal after the iſſuing out of the *capias* and before the return. For the condition of rendering is not to be underſtood of rendering the body of the principal immediately after judgment againſt him; but rendering upon demand by due proceſs of law, *viz.* the return of the *capias*. The iſſuing out of the *capias* is the beginning, and the return of it is the completion, of the legal demand. In the caſe of *Sparrow v. Sowgate* (*a*), in an action of debt, the death of the principal before the iſſuing out of any *capias* was pleaded; and on demurrer judgment was given for the bail; and this difference was taken, that when a condition is in the diſjunctive, if one part of the condition becomes impoſſible by act of God, the obligor is diſcharged from the performance of the other part (*b*). Death before the iſſuing out of the *capias* is certainly death before the return (*c*).

As to the duplicity of the plea, the anſwer is, that no advantage can be taken of it, becauſe it is but matter of form, and aided upon a general demurrer. And this is no other; for though it be ſaid, *quod placitum eſt duplex et caret forma*, that is not enough; for no advantage is to be taken of a double plea upon demurrer, without ſetting forth in the demurrer wherein the doubleneſs of the plea conſiſts. It was ſo determined in the caſe of *Smallwood v. Biſhop of Coventry* (*d*), in *Eaſter Term*, in the thirty-firſt year of *Queen Elizabeth*.

* PARKER, *Chief Juſtice.* "Rendering" is to be underſtood * [269] rendering upon demand, *viz.* at the return of the *capias*; for then is the legal demand completed. Not rendering then is a refuſal; and then the bail become liable, and not before. Pleading, therefore the death of the principal before the return of the *capias* is moſt certainly a good plea. But pleading the death of the principal before the iſſuing out of the *capias* is certainly an immaterial plea, becauſe it is material only in caſe it be found one way; for death before the iſſuing out of the *capias* is death before the return of it. But ſuppoſe it be found, that the principal did not die before the iſſuing out of the *capias*, that is plainly nothing to the purpoſe; for notwithſtanding this he may die before the return of the *capias*. As for the authorities wherein the pleading is, "death "of the principal before the iſſuing of the *capias*," this anſwer may ſerve, that the objection was never taken; and that the doubt in thoſe caſes was, whether the bail was not bound to render the

(*a*) W. Jones, 29.
(*b*) But ſee the caſe of Thomas *v.* Howell, an exception to this rule. 1. Salk. 170. 4. Mod. 66.
(*c*) Hutt. 47. Moor, 432.
(*d*) 1. Lutw. 4.

principal

WEBDALE *againſt* MANUCAPTORS OF JOCAR.

principal in convenient time, or had time to do it until the iſſuing out of the *capias*. This objection therefore, the ſtrength of which lies upon this, that the principal has time until the return, &c. would have been abſurd, at a time when it was a controverted point, whether the bail had time until the iſſuing out of the *capias*. But now the law is ſettled, that he has time until the return. The caſe at bar is exactly the ſame of *ſolvit ante diem* pleaded to a bond.

The REST OF THE JUDGES being of the ſame opinion, the plaintiff would have had his judgment.

If judgment be general, execution muſt be general.

But ANOTHER OBJECTION was ſtarted, *viz.* that the *ſcire facias* ſets forth all the proceſs until judgment in the court of king's bench, and likewiſe all the proceedings upon a writ of * error until affirmance of the judgment, and the damages and coſts in both courts, and concludes with a demand for *prædict. damn. miſ. cuſtag.* in both courts; whereas bail is not liable for thoſe in the exchequer-chamber. 1. *Rolle's Abr.* 335.

* [270]

THE COURT. If judgment be general, execution muſt be ſo too; but ſince the ſums are in their own nature ſeveral and diſtinct, why may not the Court enter the judgment *pro damn. miſ. et cuſtag. in cur. dom. reg. banc. recuperat* (*a*)?

(*a*) See the ſecond argument in this caſe, poſt. 303.

Caſe 134.

Shuttleworth *againſt* Patterſon.

A writ of enquiry is good, although the words "*et habeas ibi hoc breve*" are omitted.

THIS was a motion to ſet aſide a writ of enquiry for want of theſe words: "*et habeas ibi hoc breve.*"

THE COURT. It is well enough. There is a known difference between original and judicial writs, and that defect in form will abate the former, but defect in ſubſtance only can the latter; it was thus reſolved in *Blackmore's Caſe* (*a*). The ſubſtance of the writ is only to command the ſheriff to take an inquiſition, and the words omitted are purely directory to the ſheriff; becauſe, without returning the writ, it cannot appear to the Court, that he had an authority to take the inquiſition; and if the writ be returned, as here it is, all the ends of thoſe words, now omitted, are effectually anſwered. Beſides, a command to return the inquiſition is virtually and conſequentially a command to return the writ, becauſe the inquiſition cannot be returned to any purpoſe, unleſs the writ be ſo too; for it cannot otherwiſe appear that it is a return to the writ, or that the ſheriff had any authority for taking the inquiſition. The words "*ſi ſibi viderit expedire*" were left out in *ſcire facias*, yet * it was held good for the very ſame reaſon, *viz.* being a judicial writ; which ſhall not be abated for want of form.

* [271]

(*a*)

The

The King *againſt* Miles.

Caſe 135.

THIS was a motion to quaſh an order of baſtardy.

An order of filiation alledging the child born in ſuch a town, is a ſufficient ſtatement of the place of its birth.

THE FIRST OBJECTION againſt the order was, that it ſhould have been ſet forth, what place the child was born at; becauſe that gives the juſtices their juriſdiction.

THE COURT. The adjudging ſuch a one the father of a baſtard-child, which was born in ſuch a town, is a ſufficient ſetting forth the place of his birth.

An order of baſtardy may be made fourteen years after the birth of the child.

THE SECOND OBJECTION was, that the pariſh is out of time; for the child was fourteen years of age.

THE COURT. The pariſh is not confined to any time by the ſtatute; and there is good reaſon ſet forth in the order why the pariſh did not complain ſooner, *viz.* that the father ran away, and could not be found ſooner; and having no eſtate, nothing could be done in his abſence.

The juſtices cannot take ſecurity for performance of an order of baſtardy.

3. Salk. 66.

THE THIRD OBJECTION was, that it is awarded by the order, that the father ſhall give ſecurity, both for the performance of the order, and likewiſe for indemnifying the pariſh for the future.

THE COURT. The giving ſecurity is a thing very reaſonable in itſelf; but ſince there have been former opinions of the Court, that the juſtices have not a power to award the giving ſecurity for the due performance of their order, until ſuch time as their order has been contemned, the order muſt be quaſhed *quoad* that: but as for giving ſecurity for indemnifying the pariſh, it is right.

* [272]

* The Pariſh of Newark *againſt* The Pariſh of Wirkſworth, in Derbyſhire.

Caſe 136.

The ſettlement of the father is *prima facie* the ſettlement of his children.

S. C. 1. Seſſ. Caſes, 84.

WHEATCROFT, with his wife and children, were, by an order of juſtices, removed to *Wirkſworth*, as the place of their laſt legal ſettlement.

Upon an appeal to the ſeſſions, it appeared, that *Newark* was the laſt legal ſettlement of *Wheatcroft*, and conſequently of his wife and children; and they were therefore all removed to *Newark*.

See Rex v. Stanwix, 5. Term Rep. 670.

THE COURT was moved to quaſh the order of ſeſſions as to the children; becauſe it was no conſequence that *Newark* being the laſt legal ſettlement of the father, it muſt be ſo of the children; for they might have gained a new ſettlement.

THE COURT. This is not to be ſuppoſed.

Cottingham

Caſe 137.

Gottingham *againſt* Lofts.

A prohibition does not lie on a ſuggeſtion of a diſpute between *a peculiar* and *the prerogative court*, whether *bona notabilia* or not.

Salk. 547.

MOTION FOR A PROHIBITION, ſuggeſting, that where there is a diſpute between A PECULIAR and THE PREROGATIVE COURT, whether *bona notabilia* or not, it muſt be tried by the common law. And the caſe of *Brook v. Sir William Turner* (*a*) was cited.

THE COURT. This muſt often have happened; and if a prohibition lay, there muſt have been frequent inſtances of it. Where a prohibition is granted *pro defectu triationis*, it is upon ſuppoſition of different rules eſtabliſhed by the ſpiritual and common law; as in caſe of preſcription; but as to *bona notabilia*, the ſpiritual and common law are the ſame.

The caſe quoted was not much regarded (*b*).

(*a*) 1. Mod. 211.

(*b*) In the caſe quoted, NORTH, *Chief Juſtice*, expreſsly ſays, that when a queſtion ariſes, whether the matter is cognizable before *a peculiar*, or before *the ordinary*, as to what ſhall be *bona notabilia*, the common law retains the juriſdiction of determining. 1. Mod. 211.

HILARY TERM,

The Firſt of George the Firſt,

IN

The King's Bench.

Thomas, *Lord* Parker, *Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Nicholas Lechmere, *Eſq. Solicitor General.*

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* Walter *againſt* Warren. Caſe 138.

THIS was an action brought by the huſband for taking his wife away, and raviſhing her, *per quod conſortium, &c. per magnum tempus*, VIZ. *per ſpatium unius anni, amiſit, &c.* There was a verdict for the plaintiff, and general damages given.

In what caſe time, in treſpaſs, is neceſſary to be preciſely alledged.

IT WAS MOVED *in arreſt of judgment*, that a year had not expired from the firſt of *October*, the time of the offence, to the time of the verdict, and much leſs at the time of the action commenced; and therefore, general damages being given, it was erroneous (*a*).

ON THE OTHER SIDE *it was ſaid*, that coming under a *per quod* it was only conſequential, and laid by way of aggravation of damages, and was not the cauſe of action; that the *per magnum tempus* was enough, and the "VIZ. *per ſpatium, &c.*" ſhould be rejected as ſurpluſage, becauſe impoſſible.

* PARKER, *Chief Juſtice.* This caſe is widely different from the common caſes of *viz.* a time that is altogether impoſſible; as the thirtieth of *February, &c.* for here the whole time is not impoſ- *[274]

(*a*) Hobart, 189. 1. Mod. 271. 2. Saunders, 169. Hambleton *v.* Veere, Horn *v.* Chandler, Moore, 887. a caſe full in point.

ſible;

WALTER *againſt* WARREN.

ſible; and it cannot be known for how much of it the jury gave the damages; moſt probably to the time of the verdict.

Adjournatur.

Caſe 139. Holroi *againſt* Ebizſon.

If, on a writ of error on a judgment from the common pleas, the plaintiff in error be non-proſſed, yet no *intereſt* ſhall be allowed on the damages.

AN ACTION was brought in the court of common pleas, upon ſeveral promiſes; and judgment being by default, a writ of inquiry was executed, and four hundred and twenty-four pounds damages given. Error was brought into the court of king's bench, and the plaintiff in error *non proſſed.*

THE COURT was moved upon the ſtatute 3. *Hen.* 7. c. 10. that the defendant in error ſhould, beſides his coſts, have intereſt allowed him for the ſum adjudged due to him, pending the time of the writ of error, from the judgment.

On the ſtatute 3. & 4. *Anne*, c. 9. lately made, concerning *promiſſory notes*, the word "damages" has been extended to intereſt. On an action of debt, if judgment go by default, intereſt is allowed by way of damages, *occaſione detentionis debiti* (*a*). Where judgment goes by default, the Court gives the damages, without putting the party to the trouble of a writ of enquiry (*b*). The entries of coſts and damages in writs of error ſeem to favour this conſtruction. In *Co. Entries* (*c*) the entry is, "*pro miſis cuſtagiis et* "*damnis*," which he had by reaſon of the delay. On a *quare impedit*, where a writ of error was pending a year, the value of the living for a year was given in damages, by reaſon of this very ſtatute (*d*). * It is true, that in writs of error into the exchequer-chamber, intereſt is not allowed; but this writ of error is given by 27. *Eliz.* c. 8. and therefore not affected by ſtat. of 3. *Hen.* 7. c. 10.

* [275]

IT WAS SAID, *on the other ſide*, that this was a matter of importance; for the arguments, if good, hold equally in all actions as well as in this. The preamble takes notice of writs of error being frequently uſed only for delay; and the body of the act gives the party coſts and damages only for this wrongful delay and vexation. A writ of error is a writ of right; it is founded upon the fallibility of mankind and a juſt policy, that a man had better be a little longer kept out of his money than a wrong ſentence given. This act, and all others that lay reſtraints upon writs of error, have received a ſtrict interpretation, becauſe reſtrictive of the common law; for which the Counſel referred himſelf to caſes quoted in the caſe of *Hammond v. Webb* (*e*). It appears from the purview, that the deſign of the act was only to reſtrain the abuſe of writs of error, and ought to be extended only to thoſe that are brought for delay.

Salk. 504. 264.

(*a*) Holdip, Ex. of Dowſe, *v.* Otway, 2. Saund. 106.

(*b*) 1. H. Bl. Rep. 252. 542. 4. Term Rep. 275. 493. 5. Term Rep. 87. Tidd's Practice, 315.

(*c*) Co. Ent. 24. b.

(*d*) Anonymous, Cro. Car. 145.

(*e*) Poſt. 281.

The

The words in the act, "at the discretion of the justices, &c." shew plainly, that the damages intended by the act must be such damages as are uncertain in their nature; but legal interest is a certainty. "Costs" and "damages" are, in law, synonymous terms; "damages" do *prima facie* signify "costs," though sometimes, *ex necessitate rei*, it is extended to signify that damage which is the cause of action (*a*). In an action of debt brought against an executor, the word "*damna*" in the judgment signifies the costs (*b*). As to the case of *Holdip v. Otway* (*c*), the reason given there will not extend to this case; and proves no more than that the Court may do it, not that they will or must. * As to the forms * [276] of the entries *pro damnis et custagiis*, they follow the words of the act, but do not prove what the import of the word "*damna*" is; whether it is, or it is not, synonymous with the word costs.

To the case in *Cro. Car.* (*d*), and *Hensloe v. Bishop of Sarum* (*e*), it was answered, that it does not come up to the reason of this case; because the value was there in its own nature certain, and so much made of it by the other side; but here it is by no means certain what interest would have been made of the money; and to have made that case come up to this, not only the value, but the interest of that value, should have been allowed. It was admitted, that the practice of the court of exchequer, upon writs of error, is otherwise; and a poor reason offered to account for that difference. For the statute of 3. *Hen. 7.* says, "all writs of error;" and will therefore comprehend all subsequent statutes relating to writs of error. The three precedents of the entries of the judgments cited were of judgments in the exchequer. Now if that Court think themselves obliged to follow, in their entries, the words of this act, then surely they think the act extends to them. As to inconveniencies; the question is not about them, but what the law is. If on writ of error the judgment be reversed, and restitution awarded, it is very reasonable that there should be a recompence, but there is not. It is true, indeed, that in debt a jury will be directed to give the interest in damages; but though this be done in debt, it is never done in other actions. The costs are ascertained by the judgment, as well as the damages; and therefore interest, by parity of reason, ought to be allowed for those; but this is not pretended to. The words of the statute are general, "any writ of error;" yet some cases are resolved out of it: for example; an executor or administrator shall pay no costs at all in * writs of error, though * [277] the judgment be *de bonis propriis* (*f*). It may be a question, whether it can be judicially taken notice of, that any interest is lawful. An action of debt will not lie for money and interest (*g*). From whence it should seem, that originally and judicially interest is not to be taken notice of.

(*a*) Pelford's Case, 10. Co. 115.
(*b*) 3. Salk. 115.
(*c*) 2. Saund. 106.
(*d*) Anonymous, Cro. Car. 145.
(*e*) Dyer, 76.
(*f*) Mich. Term, 5. *Will. & Mary*, Gale *v.* Till, 3. Lev. 375.
(*g*) Seaman *v.* Dee, 1. Vent. 198. But see the case of Herries *v.* Jameson, 553.

THE

HOLROI *against* EBIZSON.

THE COUNSEL *for the plaintiff* replied, that the *quantum* of the intereſt to be allowed was in the breaſt of the court; that the act was a remedial law, and therefore ought to have a liberal conſtruction; that though "*damna*" ſometimes ſignifies "coſts," yet when joined with "*cuſtagia*" it muſt have a different ſignification; and they are diſtinguiſhed in every *poſtea*, damages ſo much, coſts ſo much.

PARKER, *Chief Juſtice.* No man is ſure of making intereſt of his money: a man cannot always place his money out to his mind: he may loſe the principal; and wherever intereſt is made, a hazard is run; but here is no hazard at all; the rate of intereſt was very low when this act was made. However, if this were a new caſe, I ſhould think it highly reaſonable, that damages ſhould be given for the delay; the word "coſts" in the act ſeems to me to relate to *vexation*, and "damages" to delay. By the common law, in every action of debt damages are given, *occaſione detentionis debiti*, either by writ of enquiry, or by the court. Where a penal ſum is recovered, damages are never given. But upon a ſingle bill, even by the common law, damages are given for the delay. This is a key to the ſtatute. Whenever a man is kept out of his juſt debt, the law implies and ſuppoſes a damage. I doubt only by reaſon of the different practice in the exchequer.

*[278] * Afterwards, in *Trinity Term*,

IT WAS RESOLVED BY THE WHOLE COURT, that the defendant, upon a writ of error brought into the king's bench, ſhould not have intereſt allowed him, by way of damages, for the ſum adjudged due to him, from the time of the firſt judgment, pending the writ of error. For at the time of making the ſtatute 3. *Hen.* 7. c. 10. which gives the damages upon writ of error, all intereſt was reputed unlawful; and therefore that ſtatute could not give it. In fact, when intereſt run higheſt, as at ten *per cent.* intereſt has not been allowed. In writs of error brought into THE EXCHEQUER-CHAMBER, intereſt is never allowed; and a uniformity in practice is to be wiſhed and endeavoured (*a*).

(*a*) In debt upon recognizance, bail in error in the exchequer-chamber are not liable to pay intereſt on the judgment between the ſigning of the judgment in the king's bench and the affirmance of it in the exchequer-chamber; but they are liable to intereſt due ſubſequent to the affirmance, Frith *v.* Leroux, 2. Term Rep. 57. Nor will the Court direct the maſter to include intereſt in the coſts to be taxed, on non-proſſing a writ of error returnable in parliament, for want of tranſcribing. Cumming *v.* Hansforth, 2. Term Rep. 58. But in debt on a judgment affirmed in error, the jury, by way of damages, may give intereſt upon the ſum recovered by the judgment from the time of ſigning it, where, by the practice of the court in which error is brought, ſuch intereſt is not allowed in coſts upon the affirmance. Entwiſtle *v.* Shepherd, 2. Term Rep. 78.—See alſo Bodily *v.* Bellamy, 2. Burr. 1094. Welford *v.* Daviſon, 4. Burr. 2127. Zench *v.* Langton, Dougl. 723. *notis.*

The

The King *againſt* Tomb. Caſe 140.

THE COURT. If recognizances are eſtreated into THE EXCHEQUER, becauſe not punctually complied with, yet if the party appear and take his trial at the next ſeſſion, he may compound for a very ſmall matter in the court of exchequer; becauſe the effect, though not the exact form, of the recognizance is complied with. Where recognizances may be compounded after they have been eſtreated.

SECONDLY, That Judges of *oyer* and *terminer* are the proper judges whether recognizances ought to be eſtreated or ſpared. It is for the advantage of public juſtice, that it ſhould be in the power of Juſtices of *oyer* and *terminer* to ſpare the recognizance, if upon the circumſtances of the caſe they ſee fit. Judges to determine whether they ſhall be eſtreated.

THIRDLY, No inſtance can be produced of any *certiorari* to remove a recognizance for appearance, from Judges of *oyer* and *terminer*; and it would be to take away a juriſdiction that properly belongs to them. No *certiorari* ever granted to Judges of *oyer* and *terminer* to remove recognizances for appearance.

* The King *againſt* The Inhabitants of Bury-Pomroi. Caſe 141.

A POOR CHILD of the pariſh of *Stock-Fleming* was, by the churchwardens, bound an apprentice to *A.* in that pariſh, and there lived with his maſter two years. Then *A.* removed to the pariſh of *Bury-Pomroi*, but gained no ſettlement; and there the apprentice ſerved out the remaining five years of his time. An apprentice gains a ſettlement in the pariſh where he *ſerves*, though bound in another.

THE COURT held, that this was a ſettlement of the apprentice in the pariſh of *Bury-Pomroi*; and that it was not neceſſary that the binding and ſervice ſhould be in one and the ſame pariſh (*a*); and the ſtatute 12. *Anne*, c. . whereby it is declared, that a ſervant can gain no ſettlement unleſs the maſter does, relates only to certificate maſters. S. C. 2. Conſt, 564. Salk. 533. 8. Mod. 168, 169. 60, 61.

(*a*) See St. Bride's *v.* St. Saviour's, 2. Salk. 533. Walbourn *v.* All Saints, Foley, 150. Rex *v.* St. Olave's Jewry, Stra. 51. Rex *v.* St. Peter's on the Hill, 2. Conſt, 565.

The King *againſt* Weſton. Caſe 142.

THIS was a conviction before juſtices, for the killing of conies in a warren incloſed. Conviction for killing of rabbits.

IT WAS MOVED to quaſh this conviction, becauſe the ſtatute 3. *Jac.* 1. c. 13. which relates to warrens incloſed, does not give this ſummary way of proceeding by conviction; and the ſtatute of 22. *Car.* 2. c. 25. which authorizes that way of proceeding, does not relate to warrens incloſed. The words of the ſtatute are to this purpoſe: "Foraſmuch as conies are deſtroyed in warrens and "grounds not incloſed, by reaſon the ſame is not probibited by the "ſtatutes in that caſe provided, which extend only to grounds in-

THE KING *againſt* WESTON.

" cloſed; therefore it is enacted, that whoever ſhall wrongfully " enter into any warren or ground lawfully * uſed for keeping of " rabbits, though the ſame be not incloſed," &c.

THE COURT. The conviction is well warranted by 22. *Car.* 2. c. 25.; for the former was a partial, this a univerſal law; " into " any warren." This ſatisfies the preamble. There is a vaſt difference between the words " not incloſed," and " though not " incloſed;" the former are reſtrictive, but not the latter. Unleſs this act extends to warrens incloſed, they would be in a worſe caſe than thoſe not incloſed; becauſe then an offence in the latter would be puniſhable by the ſhort way of conviction before juſtices, but not the former.

A SECOND OBJECTION was, that the ſummons is naught, for want of time given to the party to make his defence.

But it was anſwered, that though the reaſon of ſummons and giving time is founded on natural juſtice, that a perſon may have an opportunity to make his defence, yet this conviction being founded upon confeſſion of the party, the objection vaniſhes.

Caſe 143. Haiton and Others, Aſſignees, *againſt* Jeffreys.

Motion for leave to plead and demur; but refuſed; for demurring is not pleading.

THE COURT was moved for leave to plead a plea, and demur to the declaration, at the ſame time, upon the 4. *Anne*, c. . the words of which are, " That it ſhall be lawful for any defendant, " or tenant in any action or ſuit, or for any plaintiff in replevin, " in any court of record, with the leave of the ſame court, to plead " as many ſeveral matters thereto, as he ſhall think neceſſary for " his defence: provided nevertheleſs, that if any ſuch matter ſhall, " upon a demurrer joined, be judged inſufficient, coſts, &c."

* [281]

* THE COURT. The words of the act of parliament are, " that it ſhall be lawful to plead as many ſeveral matters, &c." Now a demurrer is ſo far from being a plea, that it is an excuſe for not pleading. Here you plead, and at the ſame time pray that you may not plead. The word " matter" imports a poſſibility that the other party may demur to it: but there can be no demurrer upon a demurrer. This was never attempted before.

There can be no demurrer upon a demurrer.—Salk. 219.

Caſe 144. Hammond *againſt* Webb.

Special bail is not required from a plaintiff in error on a bond conditioned to pay ſo much money to the obligee of another bond, if the obligor did not; for being a *bond of indemnity*, it is not within 3. *Jac.* 1. c. 8.

HAMMOND gave a bond to *Patchell*, conditioned for the payment of ſo much money by *Webb*. *Webb* gave a bond to *Hammond*, conditioned thus: " WHEREAS *Hammond* has given a " bond to *Patchell*, for the payment of ſo much money at ſuch a " day, by him the ſaid *Webb*, the condition of this obligation is ſuch, " that if the money be paid by *Webb*, according to the condition " of the ſaid bond, then this obligation is void; otherwiſe, &c."

An action was brought upon this laſt bond; and judgment given for the plaintiff; and writ of error was brought.

SALKELD,

HAMMOND against WEBB.

SALKELD, *Serjeant*, moved the Court, that upon this writ of error the plaintiff in error ſhould find ſpecial bail by virtue of 3. *Jac.* 1. c. 8. which enacts, "That no execution ſhall be ſtayed "on any writ of error or *ſuperſedeas*, for reverſing a judgment in "any action of debt or contract for payment of money only, "unleſs, &c." Now here the bond is conditioned for the payment of money only; for the condition, properly ſpeaking, begins at theſe words, "the condition of this obligation is ſuch;" what went before being only recital. We are therefore within the very words of the act; and if ſo, I am ſure this Court will not conſtrue us out of the meaning of the ſtatute; for this is a remedial law, and ought therefore to have a large and liberal conſtruction. Writs of error are in delay of that * right which the judgment has given the party, and therefore have always been looked upon by the common law with an evil eye. The ſtatute of *Marlebridge* is a penal law; and yet, becauſe a remedial law, it has been interpreted by equity. That act ſays, "*firmarii non faciant vaſtum*;" and it has been reſolved, that the word *firmarii* ſhould extend to ſtrangers; and that this act extended to waſte *omittendo*, though the word is "*faciant*," which literally imports active waſte. 8. Mod. 122. * [282]

BRANTHWAYT, *Serjeant, for the defendant in error.* This act ought not to be taken by equity, becauſe it is to take away or clog a remedy that the party has by common law. And for this very reaſon there have been caſes ruled, that this ſtatute ſhould not be taken by equity. In the caſe of *Garret v. Danby* (*a*), an action of debt upon an award held not within the ſtatute (*b*). He mainly relied upon this difference; where the bond is conditioned for the payment of money in diſcharge of a debt, and where the payment of money is in defeaſance of ſome other collateral matter. *Tout temps priſt* muſt be pleaded, notwithſtanding a tender, where the money is to be paid in diſcharge of a debt; but not where the bond is in defeaſance of a former bond. This difference is taken *Co. Lit.* 207. *a.* The condition of this bond is the ſame as a bond to ſave harmleſs; which, without doubt, is out of the act (*c*).

PARKER, *Chief Juſtice.* This bond ſtands only as a ſecurity for damages; it may be diſcharged, and the plaintiff not pay one penny; there is no difference between this bond and a bond to ſave harmleſs; and it is out of the meaning of the act.

* PRATT, *Juſtice.* The only queſtion is, whether the caſe be within the meaning of the act; for no matter whether within the words or not. And it ſeems to me, that the preſent caſe, though poſſibly within the words, is out of the meaning of this act, which is plainly this, that where a recovery neceſſarily imports a debt due, there this act takes place, but not where a recovery may or may not import a debt due; and the reaſon is, that delay in the latter caſe is not eſteemed ſo prejudicial as in the former. * [283]

Adjournatur.

(*a*) Garret v. Dandy, 1. Show. 14.
(*b*) Show. 14. 2. Keb. 131.
(*c*) 3. Bulſt. 234.

Caſe 145.

Nutton *againſt* Crow.

A writ of error directed to "Thomæ, *Lord Trevor*, Chief Juſtice of our Bench, &c." and returned, "The anſwer of Thomas Trevor, Knight, Chief Juſtice within-named, &c." is void.

THIS was a writ of error directed to "Thomæ Domino "Trevor, *Capital. Juſtic. ſuo de Banco*;" and the return was, "*Reſponſ.* Thomæ Trevor, Mil. *Capital. Juſtic. infra-* "*nominat. &c.* Placita *irrotulat. coram* Thoma Trevor, "Mil. &c."

Whitaker, *Serjeant*, moved to quaſh this writ of error, becauſe "*Thom. Trevor, Mil.*" the perſon that returned the record, could not poſſibly be the ſame perſon with "*Thom. Dom. Trevor*," to whom the writ was directed. In the caſe of *Orde v. Moreton* (*a*), where, though a record before a biſhop and ſeven is a record before a biſhop and ſix, yet the writ of error was quaſhed, becauſe wrong deſcribed. In *Ferrers' Caſe* (*b*) it was held, that "Henry Ferrers, *Knight*," and "Henry Ferrers, *Baronet*," cannot be intended to be one and the ſame perſon *Lord De La War's Caſe* (*c*) was alſo cited. In the caſe of *Heydon v. Godſalve* (*d*), a writ of error directed to "Thomæ Fle- "ming, *Capital. Juſtic. ad placita*," was quaſhed, becauſe the words "*coram nobis tenend. aſſignat.*" were omitted. If it be objected, that there is but one Chief Juſtice of the common pleas, the anſwer is, that a writ of error cannot be directed to the Chief Juſtice by name * of his office, but it muſt be by his natural name; and the reaſon is, becauſe if no return be made to the writ of error, there goes an *alias*, then a *pluries*, and then *an attachment*, which muſt be directed to him by his natural name. And the caſe is ſtronger here, becauſe there is no attachment againſt the perſon but the goods of a peer.

S. C. ante, 170.

S. C. Gilb. 104. Salk. 50.

* [284]

Salkeld *contra*. In the caſe of *Petty v. Hobſon* (*e*), a commiſſion of *niſi prius* was directed to "Francis Harvey, "*Armigero*, one of the Juſtices *Dom. Reg. de Banco*;" and the return was, that the trial was before "Francis Harvey, *Milite*, "one of the Juſtices, &c.;" yet held well; becauſe he might be *armiger* at the time of the iſſuing out that commiſſion, and *miles* at the time of the trial; and becauſe otherwiſe all the trials of the circuit would be overthrown. As to the caſe of *Lord De La War*, that was determined wholly upon the pleading. He agreed, from the authority of the Year-Book 38. *Hen.* 6. 1. and *IV. Jones*, 346. that *knight* and *eſquire*, and *knight* and *baronet*, could not be one and the ſame perſon; but that ſuch a one *miles*, and ſuch a one *dominus*, might be one and the ſame perſon. He quoted the Register, 287. b. where the ſame perſon, in the ſame writ, is called in the beginning of the writ *miles*, and in the latter end of the writ *baro*. He quoted alſo *Savill's Caſe* (*f*).

(*a*) Yelv. 211.
(*b*) Cro. Car. 371.
(*c*) Dyer, 200. b. under the name of Sir T. Weſt's Caſe.
(*d*) Cro. Jac. 341.
(*e*) Latch, 161.
(*f*) Cro. Car. 205.

Parker,

PARKER, *Chief Juſtice*, with the conſent of the reſt. The writ of error muſt be quaſhed. Names are for the diſtinguiſhing of perſons. Such a one *miles*, and ſuch a one *dominus*, are two different names, and therefore to be intended different perſons. In records and legal proceedings the whole name is to be ſet forth; and therefore THOM. TREVOR, *Mil.* here in *the placita*, muſt be intended of ſuch a one *mil.* who was no lord. * As to the caſes cited, and the difference taken between them and this, *viz.* that the ſame perſon may be both *miles* and *dominus*, but cannot be *eſquire* and *knight*, or *knight* and *baronet*, the true diſtinction is, that where this alteration has been made in the addition, and held good, both the additions have become conſiſtent, by reaſon of the difference of the times; ſince he who was *eſquire* at the time of the writ directed, may be *a knight* at the return; and ſo all thoſe caſes may remain good authorities. As to *the Regiſter*, it is nothing to the purpoſe; for the writ is only a direction, that he who at the beginning of the action was *miles* is now become *a peer*, and that the proceſs ſhould hereafter be againſt him as a peer. That writ does not import, that the ſame perſon was, at the ſame time, both *lord* and *knight* (though that be true), but that he who before was only *a knight* is now *a lord*. As to the objection, that the office aſcertains the perſon, there being but one Chief Juſtice of the Common Pleas, I anſwer, that we muſt not judge by our own knowledge, or the knowledge of anybody elſe, but by the record. Beſides, *Flemming's Caſe* is a full anſwer to this objection. The caſe alſo of *Rider v. Broderick (a)* is the ſame with this, and the Court was of the ſame opinion; but no judgment is entered.

NUTTON *againſt* CROW.

* [285]

Afterwards, in the ſame Term, two more writs of error, in the caſes of *Fuller v. Davis* and *Alexander v. Symonds* were quaſhed, for the ſame reaſon.

(*a*) Gilb. 299.

Aylwood *againſt* Woolley.

Caſe 146.

AN ACTION was brought in the court of common pleas upon three ſeveral promiſes: the firſt for fifty-five pounds; the ſecond for ſixty-five pounds; and the third for ſixty-five pounds. The defendant pleaded as to part "*non aſſumpſit*," and as to part in abatement, * thus, *viz.* as to fifty pounds of the firſt promiſe, ſixty pounds of the ſecond, and ſixty pounds of the third, *quòd breve caſſetur*, becauſe there were three actions depending in THE COURT OF EXCHEQUER for the ſame ſums. Judgment of *reſpondeas ouſter* given in the court of common pleas.

A plea in abatement muſt go to the whole.

* [286]

THE COURT of King's Bench, upon error brought, were of opinion, that the judgment in the common pleas was well given; for a plea *in abatement* muſt go to the whole, and not to part; and the three actions depending in THE COURT OF EXCHEQUER might have been pleaded in bar of the whole.

Caſe 147. ——— *againſt* Ormſton.

A bill of exchange payable "*to the order of* "*A.*" is the ſame as if it were payable "*to A. or order.*"

IN AN ACTION brought upon a bill of exchange, made payable "to the order of the plaintiff," the declaration ſet forth, that the defendant, by his acceptance, became liable to pay it to the plaintiff, *ſecundum conſuetudinem mercatorum.* Upon this declaration there is a demurrer.

IT WAS URGED *for the defendant*, that the plaintiff had only an authority to indorſe the bill, and then the indorſee might maintain an action; but that the plaintiff was not entitled to receive the money. It was compared to the caſe of a deviſe that executors ſhall ſell land, where the executors have only an authority to ſell, but no intereſt; and therefore immediately upon ſale, the vendee is in, not from the executors, but under the will.

ON THE OTHER SIDE *it was ſaid*, that if this was law, a multitude of bills of exchange would be overthrown; that by the cuſtom of merchants there is no difference between payable "*to the order of ſuch a one*," or payable "*to ſuch a one or order*;" and that the * [287] cuſtom is confeſſed by the demurrer. * That the ſame ſtrictneſs and nicety are not required in the penning of bills current between merchant and merchant, as in deeds, wills, &c. In policies of inſurance, "warranted to depart with convoy," has been reſolved to import a *continuance* with that convoy as long as may be (*a*); and this not *ex vi termini*, but becauſe it is underſtood in this ſenſe by merchants.

Salk. 443.

THE COURT. Even in caſe of land, a grant or deviſe of the profits of land carries the land. The word "*order*" implies property; there is no difference between having a power to diſpoſe of money and having the money itſelf. What is an order, but an authority to appoint the payment of it? which the plaintiff here does to himſelf.

Judgment for the plaintiff.

(*a*) See the caſe Jefferies *v.* Legendre, 3. Lev. 320. 4. Mod. 58. 1. Show. 320. Gordon *v.* Morley, 2. Stra. 1265. Victoria *v.* Cleve, 2. Stra. 1250. Hibbert *v.* Pigou, Park on Inſ. 339. Lilly *v.* Ewer, Dougl. 72. Taylor *v.* Woodneſs, Park on Inſ. 349.

Caſe 148. The Pariſh of Brightwell *againſt* The Pariſh of Henley.

A ſervice of forty days under a hiring for a year will connect with an immediately antecedent ſervice under a hiring for leſs than a year.—S. C. 1. Seſſ. Caſes, 92. S. C. Foley, 198. 143. S. C. 2. Bott. P. L. 417. 1. Stra. 83.

THREE WEEKS after *Michaelmas* a ſervant is hired until the *Michaelmas* following; and upon the *Michaelmas* following he was hired for a year until the next *Michaelmas*, but did not ſerve out the year; but his ſervice in both years was above a year.

The

The queſtion was, Whether this was a ſettlement? For though here was a hiring for a year, and a ſervice for a year, yet it was not a year's ſervice ſubſequent to that hiring.

THE PARISH OF BRIGHTWELL *againſt* THE PARISH OF HENLEY.

PARKER, *Chief Juſtice*, the reſt of the Court concurring. It is a ſettlement; for here is a hiring for a year, and ſervice for a year, though not under that hiring; which was reſolved not to be neceſſary, in the caſe of *Overton v. Steepleton* (*a*). But if a ſervant is hired, during a whole year, from week to week (*b*), and is then hired for a year, and ſerves one week, this is no ſettlement, for the want of continuance in the ſervice for forty days (*c*) after the ſecond hiring.

(*a*) Fort. 316. S. C. Sett. & Rem. 255. S. C. 3. Salk. 257. S. C. 12. Mod. 224. S. C. Burr. S. C. 549. S. C. 2. Bott's P. L. 415.—See alſo the ſame point, Rex *v.* Southmolton, 1. Ld. Ray. 426. Rex *v.* Eardiland, 2. Bott. P. L. 423. But the hiring for a year muſt be made before there is any diſcontinuance of the former ſervice, Wichford *v.* Bretford, Fort. 311. And for what ſhall be conſidered as a diſcontinuance, ſee Rex *v.* Fifehead Magdalen, Burr. S. C. 116. Rex *v.* Caverſwell, Burr. S. C. 461. Rex *v.* Ellisfield, Cald. 4. Rex *v.* St. Giles's Reading, Cald. 54. Rex *v.* Underbarrow, Cald. 65. Rex *v.* Grendon Underwood, Cald. 359. Rex *v.* Sulgrave, 1. Term Rep. 778.

(*b*) Rex *v.* Bagworth, Cald. 179.

(*c*) But it is now decided, that a ſettlement may be gained by ſerving a year under different hirings, if one of them be for a year, although there be not forty days ſervice under the yearly hiring, Rex *v.* Inhabitants of Adſon, 5. Term Rep. 98.

* Kitton *againſt* Fag.

Caſe 149.

HAMLIN, a high-ſheriff, by a legal inſtrument, made *Lancaſter* his under-ſheriff, in truſt for *Altham*, who had been under-ſheriff the year before; but neither *Lancaſter* nor *Altham* took the oaths required by 27. *Eliz.* c. 12.; and after *Hamlin*'s year was expired, and before a new ſheriff was appointed, *Altham* made an aſſignment of a bail-bond.

An *under-ſheriff* may, on the ſtatute 4. *Anne*, c. 16. aſſign a bail-bond in the name of the *high-ſheriff*; but a perſon for whom this office is held in truſt, and who has not taken the oaths directed by 27. *Eliz.* c. 12. is not a legal *under-ſheriff* within the act.

S. C. 1. Stra. 60.

N. B. *Altham* always acted as under-ſheriff, and *Lancaſter* not at all.

The queſtion was, Whether *Altham* was ſuch a perſon as that his aſſignment of the bail-bond was a good aſſignment within the ſtatute of 4. *Anne*, c. 16. for the amendment of the law.

MR. ROBINS argued, that this aſſignment was good. This caſe is to be reſolved into two points. FIRST, Whether it be neceſſary that this aſſignment be made by the high-ſheriff in perſon? And, SECONDLY, If it be not, Whether this aſſignment, being made by *Altham* the under-ſheriff *de facto*, be not a good aſſignment?

AS to THE FIRST POINT he argued, that it was formerly a doubt, if the ſheriff returned a *cepi corpus*, as he muſt, notwithſtanding by the ſtatute of 23. *Hen.* 6. c. 10. he is obliged to bail him, and has not the body in court at the day of the return, whether he was not liable to an action. The law was not ſettled in this point until the twenty-firſt year of *Charles the Second*, when

KITTON *againſt* FAC.

3. Salk. 314, 315.

it was reſolved (*a*), that he is not liable to an action. In the ſtatute of 4. *Anne*, c. 16. for the amendment of the law, though "under-ſheriff" is not mentioned, yet he is far from being excluded; he may poſſibly be included under the words "other "officers." In all miniſterial acts, whatever is done by the under-ſheriff is of the ſame authority as if done by the ſheriff himſelf (*b*). * The aſſignment of bail-bonds to the plaintiff is no new thing; it was a common practice before the ſtatute; and though, in ſtrictneſs of law, a bond being a *choſe in action*, ſuch aſſignments were not good, yet ſuch aſſignments have been taken notice of in courts of law, and not ſuffered to be evaded (*c*). The ſtatute 4. *Anne*, c. 16. is not in nature of an authority to the ſheriff, but is a judgment in parliament that the ſheriff ſhall do it, and he is liable to an action if he do not; and in chancery he may be compelled to a ſpecific performance, according to this act of parliament. There were two reaſons for making this act of parliament; the one to obviate the abuſive practice of ſheriffs in releaſing theſe bonds, and thereby cutting off the plaintiffs from the advantage of them, for whoſe ſecurity alone they were taken; and ſecondly, to remove the chicane of the law, that theſe bonds were not aſſignable, becauſe *choſes in action*. Had the ſtatute only made the bail-bonds aſſignable, and not ſaid by whom, the law would have ſaid, that the ſheriff was the perſon to aſſign it. If the ſheriff die before aſſignment, ſhall not the executor of the ſheriff aſſign it? As to the objection that may be made, that the circumſtances required by the act of parliament to be obſerved in aſſigning make it neceſſary for the ſheriff to do it in perſon, it may be anſwered, that the reaſon of preſcribing theſe circumſtances was only to make the aſſignment more effectual; and to diſtinguiſh the aſſignments by virtue of this act from thoſe in uſe before; and may therefore be compared to fines (*d*). But there was no deſign to abridge the power of the under-ſheriff. An under-ſheriff, by virtue of his office, is included in ſeveral acts of parliament, though not named (*e*). * Execution is the end and life of the law (*f*). This is a mechanical part of the ſheriff's office; and *qui per alium facit, per ſeipſum facit* (*g*).

* [289]

* [290]

As to THE SECOND POINT, it is no more than this, whether all acts done by one who appears and acts as under-ſheriff ſhould be void for want of ſome circumſtances that none think themſelves obliged to inquire into, and concern the under-ſheriff only. Though there be an under-ſheriff legally appointed, yet he not appearing, nor acting, it makes no alteration at all in the caſe. A

(*a*) In an Anonymous Caſe, 1. Vent. 55.

(*b*) Year-Book 8. *Hen.* 4. pl. 20. Hob. 13. 3. Bulſt. 77. 9. Co. 48.

(*c*) Foſter *v.* Jackſon, 22. *Car.* 2.

(*d*) 3. Co. 88.

(*e*) The ſtatute of *Weſtminſter the Second*, c. 11. c. 18.; the 25. *Edw.* 3. c. 17.; and ſee Fitz. N. B. 266. 4. Co. 64.

(*f*) 5 Co. 92.

(*g*) Co. Car. 26. Salk. 589.

gaoler

KITTON against FAG.

gaoler *de facto* is bound to take care of the priſoners (*a*); and generally the law is ſo, that acts done by thoſe reputed in authority are good (*b*). If the acts of under-ſheriffs *de facto* were void, in ſo many acts of parliament relating to ſheriffs ſome care would very probably have been taken about it.

MR. REEVES, *contra*, inſiſted, that the oath to be taken was an oath of office; that *Lancaſter* was in a legal manner conſtituted under-ſheriff; but that *Altham* had no deputation at all, but was a mere intruder; that ſuppoſing the aſſignment performed during the year of *Hamlin* might have been good, yet it would not now, being performed after (*c*). He took this difference, that where a ſtatute appoints anything to be done by the ſheriff, and preſcribes no particular manner for the doing of it, which makes it neceſſary to be a perſonal act, there the under-ſheriff may do it, though the ſheriff only is mentioned; but where the manner and circumſtances enjoined and preſcribed by the act make it a perſonal act, there the * under-ſheriff cannot perform it; which difference anſwers all the inſtances brought from acts of parliament; and he inſiſted, that the ſtatute enjoining the aſſignment to be under the hand and ſeal of the ſheriff did make it a perſonal act. Indeed, in *Engleſield's Caſe* (*d*) it is held, that tendering a ring is no perſonal act; but then it is reſolved, in the *Duke of Norfolk's Caſe* there quoted, that the uſes being revocable by writing under the proper hand and ſeal of *the Duke*, it was a perſonal act, and not capable of being performed by anybody elſe. This caſe is exactly the ſame with that at the bar, except the addition of the word "proper," which, according to the caſe of *Smith v. Wheeler* (*e*), makes no difference at all. If the ſheriff die before aſſignment, his executor cannot do it. This is *caſus omiſſus*; and the plaintiff muſt ſue in the ſheriff's name, as at the common law before this ſtatute 4. *Anne*, c. 16.

* [291]

Adjournatur (*f*).

(*a*)

(*b*) 2. Inſt. 381. Cro. Eliz. 699. Howell's Caſe, 1. Keb. 357. and Harris *v.* Jay, Moor, 112. Cro. Eliz. 34.

(*c*) Year-Book 34. *Hen.* 6. 3. 6. 1. Roll. Abr. 894. Moor, 112. 757. Yelv. 44. Cro. Jac. 73.

(*d*) 7. Co. 11.

(*e*) 1. Vent. 128. 1. Mod. 40.

(*f*) PARKER, *Chief Juſtice*, in Trinity Term, 3. *Geo.* 1. ſaid, that he had had the advice of all his Brothers on this caſe, and that they were of opinion, that an under-ſheriff himſelf might aſſign a bail-bond in the name of the high-ſheriff, it having been the conſtant practice ſince the ſtatute 4. *Anne*, c. 16.; but that if the aſſignment were neither by the high-ſheriff nor his under-ſheriff, it would not be good: and that being the preſent caſe, the defendant had judgment. S. C. 1. Strange, 60.

HILARY

HILARY TERM,

The Firſt of George the Firſt,

IN

The King's Bench,

AT

Niſi Prius,

BEFORE

Sir Thomas Parker, *Knt. Chief Juſtice.*

Reeves *againſt* Symonds.

Caſe 150.

On the trial of an action for goods ſold and delivered, a perſon cannot be admitted to prove, that the plaintiff gave the credit to *him*, and not to the defendant.

THIS was an action brought by *Reeves* for a quantity of ſtockings ſold to *Symonds*.

The defence of *Symonds* was, that it was not he that bought the ſtockings, but his ſon, who ſent them to *France* in the way of trade.

To prove this he would have called his ſon.

PARKER, *Chief Juſtice.* He cannot be an evidence; becauſe here is an advantage made by way of trade; and to whom this advantage ſhall accrue depends entirely upon this queſtion, Who made this contract? and now one comes to ſwear, that he made the contract himſelf.

* DARNELL, *Serjeant.* He may be a witneſs; becauſe he will neither get nor loſe by the event of this cauſe; for what is now given in evidence cannot be given in evidence in another action. * [292]

PARKER, *Chief Juſtice.* This you have often ſaid, and I as often anſwered. If an action be brought by a commoner for his right of common, ſhall another perſon that claims a right of common upon the ſame title be allowed to give evidence? No; and yet it is certain that he can neither get nor loſe in that cauſe; for the

REEVES *againſt* SYMONDS.

the event of that cauſe will no way determine his right. But though he is not intereſted in that cauſe, he is intereſted in that queſtion upon which the cauſe depends; and that will be a bias upon his mind. It is not his ſwearing the thing to be true that gives him any advantage, but it is the thing's being true; and the law does judge, that it is not proper to admit a man to ſwear that to be true which it is plainly his intereſt ſhould be true.

Hob. 92.
2. Vern. 375.

EASTER TERM,

The First of George the First,

IN

The King's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Pratt, *Knt.*
Sir Simon Harcourt, *Knt. Attorney General.*
Nicholas Lechmere, *Eſq. Solicitor General.*

* The Pariſh of Frencham *againſt* The Pariſh of Pepperharrow. Caſe 151.

THIS was the caſe of a ſettlement; and in the order of the juſtices the fact was ſtated ſpecially.

A ſervant was hired two or three days after *Michaelmas*, to ſerve until *Michaelmas* next; but he ſerved as many days after *Michaelmas* as made his year compleat, and then received his wages.

A ſervice for a year will not gain a ſettlement, unleſs there is alſo a hiring for a year.

S. C. 1. Seſſ. Caſes, 71. S.C. Foley, 144. S. C. Fort. 322. S. C. Sett. & Rem. 56.

DARNELL, *Serjeant*, argued, that this was no ſettlement; for the Court muſt take the fact as ſtated by the juſtices; and therefore, though the circumſtances ſet forth in the order might have been ſufficient to have induced the juſtices to have found this a fraud, and that the real hiring was for a whole year, yet ſince they have expreſsly ſtated the fact otherwiſe, and that he was hired three or four days after *Michaelmas*, until *Michaelmas* next, the Court muſt take the fact for granted; and then there can be no ſettlement, becauſe there is no hiring for a year, as the law requires.

Adjournatur.

But afterwards, *ut audivi*, it was held no ſettlement.

Caſe 152.

* Joſſelyn *againſt* Lacier.

A bill, requiring the drawee to pay "*ſeven pounds a month out of the growing ſubſiſtence of the drawer*," is not a negotiable bill of exchange within the cuſtom of merchants; and a promiſe to pay it *ſecundum tenorem billæ*, will not ſupport an action.

THIS was A WRIT OF ERROR upon a judgment given in the court of common pleas in an action of *aſſumpſit*, where the plaintiff declared, that *Evans* drew a bill upon *Joſſelyn*, requiring him to pay *Lacier* ſeven pounds every month (the firſt payment to begin in *December*, about two months after the date of the note) *out of the growing ſubſiſtence* of *Evans*, and place it to his account; that *Lacier* carried the note to *Joſſelyn*, who accepted it, and promiſed to pay it, *ſecundum tenorem billæ*; by which acceptance, according to the cuſtom of merchants, he became liable; and that afterwards he refuſed to pay, &c.

The defendant pleads *non aſſumpſit infra ſex annos*; and judgment was given for the plaintiff, upon which judgment the preſent writ of error is brought.

S. C. poſt. 316.
S. C. Fort. 281.
1. Wilſ. 262.
3. Stra. 24.

BRANTHWAYT, *Serjeant*, who was of counſel for the plaintiff in error, owned that the defendant's plea was naught; for the promiſe being to do an act upon a future day, the plea ſhould not have been *non aſſumpſit*, &c. but that *cauſa actionis non accrevit infra ſex annos*. But he inſiſted that the declaration was vicious; for the plaintiff declared upon the cuſtom of merchants, concerning bills of exchange; and yet ſets forth ſuch a bill, as in the very nature of it appears not to be a bill of exchange. It is eſſential to a bill of exchange to be negotiable, which this cannot poſſibly be; becauſe it is to pay upon a contingency, "out of the "growing ſubſiſtence" of *Evans*. If it ſhould be objected, that there is ſet forth in the declaration an expreſs promiſe to pay, it may be anſwered, that this will not help the matter; becauſe a * naked promiſe, a *nudum pactum*, is not in law a ſufficient foundation for an action. There muſt be a conſideration; and the conſideration muſt be particularly ſet forth in the declaration, that ſo the Court may judge whether it be ſufficient to maintain an action. In the caſe of *Foſter v. Smith (a)* the plaintiff declared, that the defendant being indebted promiſed to pay; and it was held that the conſideration was not ſufficiently ſet forth, for that the plaintiff ought to have ſpecified the cauſe of the debt; as money lent, goods ſold or delivered, &c. In the caſe of *Fricket v. Manly (b)*, "*paululum tempus* he ſhould forbear," is held not a good conſideration; becauſe no certain judgment can be made, what portion of time that is. A conſideration of forbearance for a convenient time, will be good; but then there muſt be an averment how much time he did ſtay (*c*). In the caſe of *Wiſe v. Wiſe (d)*, in an *aſſumpſit* by an executor the plaintiff declared, that the defendant being indebted to the teſtator in the ſum of twenty pounds, according to an agreement between them made, promiſed to pay; and after verdict for the plaintiff, upon *non aſſumpſit*, the judgment

Ante, 104.
Salk. 422.

* [295]

Salk. 129.

(*a*) Cro. Car. 31.
(*b*) 1. Sid 45.
(*c*) By WINDHAM, *Juſtice*, 1. Sid. 45.
(*d*) 2. Lev. 152.

was arreſted, for want of ſetting forth this agreement. The caſe of *Pearſon v. Ganell (a)* was ſtrongly inſiſted upon, as a caſe in point, to prove that this was not a bill of exchange; and that a declaration upon it, as a bill of exchange, was erroneous. JOSSELYN *againſt* LACIES.

MR. REEVES, in affirmance of the judgment, argued,

FIRST, That this was a good bill of exchange; for the words "out of my growing ſubſiſtence," do either import ſome intereſt or effects that the acceptor had of the drawer in his hands, or they are idle and inſenſible. If the former, then the caſe is in effect this: *A.* draws a bill upon *B.* requiring him to pay *C.* ſo much money, out of the money that is in his hands; *non refert* whether *B.* has any money of *A.* actually in his hands; for by his * acceptance, he is eſtopped from ſaying the contrary. But if the words are inſenſible, then they are ſurpluſage. * [296]

SECONDLY, He argued, that ſuppoſing this not to be a good bill of exchange, there was an expreſs promiſe laid, and a ſufficient conſideration to ſupport it. Labour and trouble, &c. are ſufficient conſiderations to ſupport an *aſſumpſit*, as a valuable one; for almoſt any conſideration, though ever ſo ſmall, has been held ſufficient to ſupport this ſort of action (*b*). He inſiſted, that the drawing the bill was a requeſt and authority to demand the money; and that the trouble the plaintiff was at in demanding the money, was a good conſideration.

BRANTHWAYT, *Serjeant*, replied, that the going of the plaintiff to demand the money, was no part of the contract, nor any advantage to the party that made the promiſe.

Adjournatur (c).

(*a*) 4. Mod. 242.

(*b*) 3. Cro. 77. 1. Sid. 369. 2. Vent. 71. 74.

(*c*) The Court was of opinion, that this was not a good bill of exchange within the cuſtom of merchants; and therefore that the action could not be ſupported by the promiſe. S. C. poſt. 316.

The Queen *againſt* Blagden. Caſe 153.

MR. REEVES, *for the defendant*, obſerved, that if the crown had a right to join iſſue upon the traverſe, yet the iſſue was here ill joined, becauſe not joined in the words of the traverſe, but more narrow and reſtrictive. The information charges the defendant with uſing the office, liberties and privileges, franchiſes, &c. of portreeve of the town of *Honiton*, and the traverſe is taken in words as general and comprehenſive as the charge; but the iſſue taken upon the traverſe is ABSQUE HOC that he uſurped the office generally. Now a man may uſurp the office, and not uſurp all the privileges, &c. relating to that office. S. C. ante, 212. S. C. Gilb. 6. 145.

As

Pleading.

Whether the crown may take iſſue upon the traverſe?

* As to THE MAIN QUESTION, Whether the crown is at liberty to take iſſue upon the traverſe, or not? the only precedent alledged in behalf of the power of the crown, was that of *The Queen v. Walcourt (a)*; and there the queſtion never received any judicial determination, becauſe the defendant died. As to the caſe of *Sir Gervas Clifton (b)*, he ſaid, that it appeared from a larger report of that caſe in *Godbolt (c)*, that it was *nihil ad rem.* In the writ of ſeiſin in *Coke's Entries (d)*, where the other entries are ſet forth, the traverſe is omitted, which proves it immaterial.

Of the difference between informations of intruſion, and thoſe in the nature of a *quo warranto.*

To the objection, that in an information of intruſion, the king may take iſſue upon the uſurpation, though a title be ſet forth; he anſwered, that an information of intruſion was of a different nature from this; becauſe *non ſequitur*, from his having a title, that he is no intruder; but it does, that he is no uſurper. The courſe of precedents is ſo in intruſion; but otherwiſe in this kind of information; which is a preſumptive argument that there is a difference. Another difference there is, that in an information of intruſion, the crown ſets forth its title, and concludes "*de præmiſſis, &c.*"

Then he argued, that the allowing the crown to join iſſue upon this traverſe, in their replication, would be inconvenient to the crown, inconvenient to the party, inconvenient to the Court; and *argumentum ab inconvenienti fortiſſimum in lege.* In the firſt place, it is inconvenient to the crown; becauſe by this the matter is put
* [298] at large; the defendant may give anything in evidence; and it amounts, in effect, to the general iſſue of *non uſurpavit (e)*. * All the inconveniencies of allowing general iſſues will follow upon allowing this. If the king can take iſſue upon this, he is bound to do it. Where the defendant ſets forth his title with traverſe, and the king's title is upon record, there the king may either traverſe the defendant's title, or he may waive that, and take iſſue upon the defendant's traverſe; but if his title do not appear upon record, then the king is bound to take iſſue upon the defendant's traverſe *(f)*. As to the objection, that no prerogative of the crown is here inſiſted upon, but only a right common to every ſubject; it is enough to anſwer, that THE ATTORNEY-GENERAL would not be content in this caſe to be bound down by the ſame rules of pleading that the ſubject is: the ſubject could not have avoided taking the iſſue, but no one will ſay the crown was bound to do this.—Secondly, This would be inconvenient to the party; becauſe it renders it almoſt impoſſible for him to prepare for his defence; for the crown may upon this iſſue attack his title, or may give in evidence a miſuſer or forfeiture of his office.—Thirdly, This would be inconvenient to the Court. For the Court cannot tell what judgment to give, without being certified from the Judge that tried the cauſe, what the nature of the evidence was; for the uſing

(a) Hilary Term, 23. *Eliz.* Roll. 1.
(b) 3. Leon. 184.
(c) Godb. 91.
(d) Co. Ent. 529, 549.
(e) Heydon's Caſe, Co. Ent. 372.
(f) Brook. Abr. "Prerogative" 116. Vaugh. 64.

an

an office without a title, and the forfeiting an office by miſuſing, require different judgments. THE QUEEN *againſt* BLAGDEN.

In the laſt place, he inſiſted, that the defendant, by ſetting forth his title, had anſwered the whole charge of the information, which was for him to ſhew *quo warranto*, &c.

THE COURT were all of opinion that the defendant ſhould have judgment.

PARKER, *Chief Juſtice*. Nobody ever thought that "*non* "*uſurpavit*" was a good plea; and the reaſon why it * is not, evidently appears from the nature of the charge, which is for him "to "ſhew, by what warrant or authority, &c." to which that plea is no anſwer; and if this could not have been pleaded in bar, then moſt certainly that replication, which in effect ſets up that plea again, muſt be naught. If "*non uſurpavit*" were a general iſſue allowed in this caſe, all the reſt of the pleadings would be to no other purpoſe but to lengthen the record. The difference obſerved by MR. REEVES between the caſe before us, and an information for intruſion, is very juſt; for though the defendant ſhould have a title, yet it is very poſſible he may be an intruder, but impoſſible that he ſhould be an uſurper. * [299] Hob. 117.

POWYS, *Juſtice*, was of the ſame opinion. The very reaſon of joining iſſues, is that the party may come prepared to defend one ſingle point. In the caſe of barratry the law is otherwiſe; but then it muſt be told what point will be gone upon.

PRATT, *Juſtice*. I am of the ſame opinion. For had "*non* "*uſurpavit*" been a good plea, every-body would certainly have pleaded it; becauſe by this means THE ATTORNEY-GENERAL would be kept in the dark, and unacquainted with the nature of the defendant's title; and the hazard of ſetting forth a ſpecial title, where the greateſt certainty in pleading is required, might be wholly avoided. Beſides, the labour of pleading ſpecially is entirely loſt, if all may be ſet aſide by a general replication.

Judgment was accordingly given for the defendant.

* [300]

* Muſton *againſt* Yateman.

Caſe 154.

THE COURT was moved for the plaintiff, by MR. FORTESCUE, in arreſt of judgment. Of defects in pleading being aided by verdicts.

Two points conſiderable.

FIRST, Whether the defendant's plea was not naught? Becauſe it ſays only, that *Sir Thomas Freke* was ſeiſed generally; but does not ſay, that he was ſeiſed *in dominico ſuo ut de feodo*, which eſtate only can ſupport a preſcription. S. C. ante, 228. S. C. Gilb. 305.

SECONDLY, Whether, ſuppoſing the plea to be naught for this reaſon, the finding of the jury had not cured this defect?

MUSTON *againſt* YATEMAN.

THE FIRST POINT he waived as ſufficiently ſpoken to formerly.

As to THE SECOND POINT he argued, that this defect in the plea was not aided by the verdict, becauſe the ſeiſin was no part of the iſſue; but previous to the uſage, and admitted by the replication, whereby the uſage only was put in iſſue. The general reaſon, why defects in pleading are cured by verdicts, is, becauſe it is to be ſuppoſed, that the verdict could not have been found, unleſs there had been evidence given at the trial of that matter wherein the pleading is defective (*a*). But this not being part of the iſſue, can never be ſuppoſed to be given in evidence. Nay, this is not only no part of the iſſue; but it is not even a neceſſary conſequence of the iſſue, for there might be ſuch a uſage, and yet the party not ſeiſed in fee. Had the jury found a title, that he was ſeiſed in fee, it had been erroneous; or at leaſt it had been a void finding (*b*). The only caſe, where a bad preſcription is held to be cured by a verdict, is the caſe of *Anſly v. Fawkener (c)*, and that caſe is eaſily anſwered; for firſt, How was it poſſible, that any finding of the jury could maintain that preſcription, which * the law ſays is naught? And yet that is the caſe there; for there the preſcription was, that the defendant and all the occupiers of the ſaid cloſe, time out of mind, &c.; and this preſcription was by the Court held too general; for a tenant at will, or a diſſeiſor, may be an occupier. And ſecondly, this caſe is denied to be law, in the caſe of *Thorn v. Rockby* (*d*). To the caſe in *Hutton*, 54. quoted when the caſe was ſpoken to before, he anſwered, that there of neceſſity the verdict muſt help; becauſe a grant of a thing being alledged, which in its own nature could not be granted but by deed; unleſs the jury had found the deed, they could have found no grant at all. Then he quoted ſeveral caſes (*e*), wherein it was held, that bad and defective pleadings are not aided by verdicts.

* [301]

Hob. 186.

SALKELD *for the defendant* inſiſted, that after a verdict, this muſt be intended a ſeiſin in fee. In 1. *Ventris*, 122. it is ſaid by THE CHIEF JUSTICE, that after a verdict, the Court would make any intendment to make the caſe good. The caſe in 1. *Sidenfin*, 218. proves that a Court will ſtrain very hard to ſupport a verdict. The queſtion therefore is, Whether "ſeiſin" can poſſibly be intended of a ſeiſin in fee? And without doubt it may; for ſeiſin is the *genus*; ſeiſin in fee, in tail, for life, &c. are the *ſpecies*. The word "ſeiſed" rather imports ſeiſin in fee than any other eſtate; becauſe ſeiſin in fee is the mother eſtate, and all the other particular eſtates begin by contract. In the pleading of a fine it is *ſeiſitus* only; and yet always underſtood to be *de feodo*. Could not the plaintiff have replied, that *Freke* was ſeiſed for life, and have traverſed the ſeiſin in fee * *modo et forma*, as by the plea was ſup-

* [302]

(*a*) 1. Mod. 161.
(*b*) 1. Sid. 96.
(*c*) Cro. E. 12 446.
(*d*) Michaelmas Term, 9. *Ann.*
(*e*) Hob. 189. Action upon the caſe. 2. Cro. 245. Aſſumpſit. 3. Cro. 419. Caſe. 3. Cro. 515. Debt upon obligation. Styles, 220. Aſſumpſit.

poſed?

poſed? Certainly he might; for whatever is neceſſarily ſuppoſed in a plea, may as well be traverſed as what is expreſſed (*a*). If this had been traverſed, then no queſtion this had been in iſſue. Evidence likewiſe might have been given by the plaintiff to ſhew, that *Freke* was ſeiſed for life, and not in fee; and this had made an end of the iſſue. He likewiſe took a difference between a defective title in itſelf, and a title defectively ſet forth; the former cannot be ſupported by a verdict, but the latter may. For this purpoſe he cited, *Dorne v. Caſhford* (*b*), *Crouther v. Oldfield* (*c*), *Harriſon v. Peck* (*d*), and *Blackford v. Atkins* (*e*). From the verdict found by the jury, it is plain that it muſt be ſuch a ſeiſin, as that thoſe whoſe eſtates *Sir Thomas Freke* had, did time out of mind uſe ſuch a way, &c. Now this could not be any other ſeiſin but in fee; therefore the verdict has helped the plea.

MUSTON *againſt* YATEMAN.

Salk. 279.

PARKER, *Chief Juſtice.* It is as clear as the ſun, that unleſs evidence had been given to the jury of *Sir Thomas Freke's* having an eſtate in fee, they could not have found ſuch a verdict; and then, according to the rule laid down by MR. FORTESCUE, the verdict has helped the pleading. Seiſin in fee, as was ſuppoſed in the plea, might have been traverſed.

POWYS, *Juſtice*, concurred with PARKER, *Chief Juſtice.*

EYRE, *Juſtice*, doubted.

PRATT, *Juſtice*, concurred ſo ſtrongly with PARKER, *Chief Juſtice*, that he held the plea would have been good, even upon a general demurrer. The word "*ſeiſitus*," *ex vi termini*, no more imports ſeiſin for life, than ſeiſin in fee. It is true that "*ſeiſitus*" alone, ſhall be intended a ſeiſin for life; but the reaſon is, becauſe it is a maxim of law, that *verba* * *contra proferentem fortius accipienda ſunt* (*f*); and a ſeiſin for life is the moſt prejudicial ſeiſin to him that pleads it. Therefore if any averment follow in the ſame plea, that neceſſarily reſtrains the ſeiſin to a ſeiſin in fee, upon a general demurrer it is well. And this is the caſe here; for the ſubſequent averment, "that he and all thoſe whoſe eſtate he had," muſt be falſe, unleſs it were a ſeiſin in fee. And if this be neceſſarily included in the verdict, as undoubtedly it is, then it is aided by it. The authorities are innumerable.

* [303]

3. Salk. 279.

Adjournatur.

(*a*) Gilbert v. Parker, Eaſter Term, 3. *Ann.* Salk. 629.

(*b*) Eaſter Term, 9. *Will.* 3. Salk. 363.

(*c*) Hilary Term, 4. *Ann.* Salk. 170. 365. 1. Lutw. 125. 2. Ld. Ray. 1225.

(*d*) Palmer, 420. S. C. Latch. 119.

(*e*) Hobart, 116, 117.

(*f*) Ante, 229. Hob. 244.

Caſe 155. Weddall *againſt* Manucaptors of Jocar.

Of the difference between pleas of performance, and pleas in excuſe. S. C ante, 267. Salk. 520.

SALKELD, *Serjeant*, who was Counſel for the bail, in anſwer to the objection againſt the plea, that had been made when the caſe was ſpoken to laſt, inſiſted copiouſly upon a difference between *pleas of performance*, and *pleas by way of excuſe*. Had this been pleaded by way of performance, he owned it would have been naught; but he contended that it was by way of excuſe, and therefore well. The only matters that can be pleaded as a performance, to this recognizance, are either rendering the body, or paying the condemnation; but this is none of thoſe; *ergo* a plea in excuſe. Had it been a plea of performance, it had been naught; becauſe the iſſue joined upon it would then, according to the objection, have been material only one way. A plea in excuſe, in the very nature of it, implies a non-performance; and it is always deciſive and effectual; becauſe the Court will intend nothing in favour of him that pleaded it, but what is contained in the very plea: and therefore the bail having pleaded here, that the principal * [304] died *ante emanationem brevis*, by way of * excuſe, the Court ſhall never intend the death of the principal, between the emanation and the return of the writ; ſo that if at a trial upon this iſſue there had been evidence that the principal was alive at the time of the emanation of the writ, judgment muſt have been given for the plaintiff; nor would any evidence have been received of his death between the emanation and return. As for the caſes of debt upon bond, and *ſolvit ante diem* pleaded; they are not parallel, becauſe pleaded as performance (*a*). There is no doubt but "accord "with ſatisfaction," though before the day, may be pleaded in bar of debt upon bond; and yet the objection will hold equally here, *viz.* that it is poſſible, that though this plea ſhould be found againſt the defendant, yet he might pay the money according to the condition of the bond at the day; and therefore the iſſue joined upon this plea, is material only one way. Now, this is a plea by way of excuſe, which ſuppoſes non-performance. Pleading is only ſetting forth that fact, which in law is a good diſcharge; if therefore the death of the principal *ante emanationem brevis*, be ſuch a fact as in law diſcharges the bail, certainly the bail may plead it.

MR. FORTESCUE *contra*. What is a good diſcharge may no doubt be pleaded, but then it muſt be pleaded properly and in due form. The proper way of pleading it had been, that the principal died before the return of the *capias ad ſatisfaciendum*. So is *Thompſon's Entries*, 280. and all the precedents. The end and deſign of joining iſſues, is to be final and concluſive, to determine the matter one way or the other. No iſſue can be joined on this plea, that can be material both ways; and it is parallel with the caſes of *Hill v. Manby* (*b*), *Atwood v. Coleman* (*c*), and *Merril*

(*a*) Cro. Jac. 434. Robinſon's Entries, 156. Yelv. 192. 7. Co. Rep. Finnel's Caſe. 2. Rolle's Rep. 187.

(*b*)

(*c*)

v. Joſſelyn,

Wᴇᴅᴅᴀʟʟ *againſt* Mᴀɴᴜᴄᴀᴘ-ᴛᴏʀꜱ ᴏꜰ Jᴏᴄᴀʀ.

Joſſelyn (*a*), where "*ſolvit ante diem*" was pleaded, and held that the other party had no remedy but by demurring to the plea.

* As to THE SECOND POINT; namely, the objection taken by the Counſel for the defendants to the *ſcire facias*, that the *ſcire facias* was brought not only for the coſts and damages given againſt the principal in the original action, but likewiſe for the nine pounds additional coſts adjudged upon the writ of error, whereas it appeared upon *oyer* of the recognizance, that the bail was only bound to pay what was given againſt the principal in the original action; Mr. Fortescue anſwered, * [305]

First, That the word "*prædict.*" ſhould refer only to the hundred and five pounds, and not both to the hundred and five pounds and the nine pounds too.

Secondly, That the concluſion *ſecundum formam et effectum recogn. prædict.* did neceſſarily tie down the word "*prædict.*" to ſuch damages and coſts only, as could be recovered by that recognizance.

Thirdly, That this fault might be cured by entering a *nolle proſequi* as to the nine pounds, and taking out execution only for the hundred and five pounds. A *ſcire facias* is in the nature of an action of debt; and therefore to be governed by the ſame reaſon. If I demand too much, I may releaſe it; and this releaſe is no falſifying the writ. One may releaſe an ill demand, as well as a good one (*b*). Hob. 178. Salk. 658, 659.

Salkeld *replied* to this laſt point, that he never before heard of *nolle proſequi's* being entered upon writs; that he had heard of abridging counts, but never of abridging writs; that this was not only a writ, but a judicial writ, which is the act of the Court, and muſt have a foundation on which it is warranted.

Parker, *Chief Juſtice*. There is, no doubt, a difference between *pleas of performance*, and *pleas of excuſe*, in many reſpects. But the queſtion here is, Whether you can make that time which is immaterial, part of the iſſue? * It ſeems to be a general rule of reaſon, as well as law, that circumſtances ought never to be put in iſſue any further than they touch the matter in queſtion; and whatever iſſue does otherwiſe is immaterial. * [306]

As to the other point, the word "*prædict.*" muſt refer to the nine pounds, as well as the hundred and five pounds; becauſe there is no other end or purpoſe whatſoever that the nine pounds is mentioned, but only that the *prædict.* may relate to it. The words "*de placito prædict.*" muſt relate to both pleas, or elſe it is uncertain to which. A *ſcire facias* is a judicial writ, founded upon record; and therefore if a writ iſſue out, not warranted by the record, it muſt be quaſhed.

(*a*) Poſt. 14. 8. Mod. 346. 1. *Ann.* Incledon *v.* Cripe. Styles, 175.
(*b*) Hobart, 133. Michaelmas Term, Theſau. Brevium. 234.

WEDDALL *againſt* MANUFACTORS OF JOCAL.

PRATT, *Juſtice.* I did, upon the firſt argument, think the plea naught; now I am ſomewhat doubtful. There is no doubt but the defendant might have pleaded, that the principal died before the return of the *capias*; but ſince he has pleaded more to his diſadvantage, I doubt he muſt prove his excuſe, in the ſame way that he has pleaded it. Though this or that particular day is immaterial, yet time is material; and the pleading of the death of the principal generally, without confining it to ſome time, would not have been good. Since therefore it was neceſſary for him to confine it to ſome time, and he has confined it to this time, though this be a narrower portion of time than what he was obliged to, yet, ſince it is his own excuſe, he muſt ſtand and fall by it; and the Court will not intend a fact in his favour, which he neglected to plead. Suppoſe a bond of a hundred pounds, conditioned for the payment of fifty pounds, the defendant pleads twenty pounds paid in ſatisfaction, and upon the trial of the iſſue, it appears that ten pounds were received in ſatisfaction, the verdict muſt go againſt the defendant; and yet the ſum of ten pounds, received in
* [307] ſatisfaction, is as good a diſcharge * in law, as the ſum of twenty pounds; but being a plea in excuſe, he is bound to prove it, as he pleaded it.

PARKER, *Chief Juſtice.* A difference in the ſum varies the accord, but ſo does not a variation of time. Suppoſe a bond, conditioned for the payment of money before ſuch a day, and the defendant pleads that he paid the money ſuch a day, according to the condition of the bond; and ſuppoſe, upon evidence, the fact comes out thus; that the money was paid after the day he pleaded payment upon, but before the day mentioned in the condition of the bond; and this is found ſpecially, What is to be done? If it be once laid down as a principle, that whatever is pleaded by way of excuſe, is neceſſary to be proved, and part of the iſſue, then my brother PRATT is right.

PRATT, *Juſtice.* If a perſon has judgment to recover two diſtinct ſums, and being ſenſible that he has a right only to one, he releaſes the other, and takes out execution for the one only, can this judgment be reverſed? and yet the judgment is the act of the Court. But here the *ſcire facias*, though it be the act of the Court, yet is not purely the act of the Court, but grounded upon the prayer of the party. MR. FORTESCUE has cited no precedents; but I ſee nothing in the nature or reaſon of the thing, why a *nolle proſequi* may not be entered as to the nine pounds.

Caſe 156.

The King *againſt* Gully.

An order for maintenance of a poor relation muſt ſtate, that the party was unable to work.

AN ORDER OF SESSIONS, ordering the father to pay ſo much a week towards the maintenance of his daughter was quaſhed, becauſe it was not ſet forth in the order, that ſhe was unable to work.—S. C. Sett. & Rem. 70. S. C. 1. Seſſ. Caſes, 90.

work,

work, without which the juſtices have no juriſdiction. But * by "unable to work," the act means a perſon not able by work to get his own living; and not a perſon that is able to get nothing at all (*a*).

THE KING *againſt* GULLY.

ANOTHER EXCEPTION was taken to the order; and that was, that this allowance was to be paid "until further order;" whereas it ſhould have been, "as long as the father continued able to allow, and the daughter poor and unable to work."

An order of maintenance "until further "order," is good.

But this exception was over-ruled.

Ante, 85.

(*a*) See Rex v. Hyworth, 1. Stra. 10.

Salk. 534.

The King *againſt* The Biſhop of Meath and Others.

Caſe 157.

THIS was A WRIT OF ERROR, upon a judgment in a *quare impedit*, out of *Ireland*.

Proceedings in *quare impedit*.

There were two exceptions taken to the writ of error, by the Counſel for the defendant in error.

THE FIRST was, That the return to the writ of error was, by "RICHARD COX, *Mil.*" and not "*Capital. Juſtic.*"

SALKELD, *Serjeant*, in anſwer to this, quoted ſeveral *Entries* (*a*), in ſome of which no "*reſponſ.*" at all; but only "*record. et proceſſ. de quibus, &c. ſequuntur in hæc verba*;" in ſome the name of the Judge "*infra nominat.*" and no more; and produced in court ſeveral precedents of returns to writs of errors out of *Ireland*, in the very ſame manner as in the principal caſe.

He urged, that whenever any record came into court, the time for debating whether the record was returned by a proper officer, was the firſt Term; for if it remain a Term undiſputed, it muſt be taken for granted that it was returned by a proper officer. No officer but a ſheriff, and that by the ſtatute of *York*, is obliged to ſet his name to the return. * The returning of a record by a Judge of an inferior court to a ſuperior court, is not a judicial act, but a miniſterial one.

* [309]

THE SECOND was, That the writ of error was *quid cum, &c. per breve noſtrum de quare impedit*; whereas the words of the writ are, *quòd permittat ipſum præſentare, &c.* and there is no ſuch writ as *quare impedit*.

SALKELD, *Serjeant*, anſwered to this, that *Bracton* (*b*) diſtinguiſhes between the writs of *quod permittat* and *quare impedit*. That *quod permittat* was either an antiquated writ, or taken away

(*a*) He quoted Coke's Ent. 225. 228. 231. 244. Pla. 6. 248. Pla. 8. 249. Pla. 9. 252. Pla. 10. 257.

(*b*) Bract. 246, 247.

THE KING *againſt* THE BISHOP OF MEATH AND OTHERS.

by ſome old ſtatute now loſt, and he cited the ſtatute 13. *Edw.* 1. c. 5. and *Maynard* (*a*), to prove there never was ſuch a writ as *quod permittat.* In all judicial records it is called a *quare impedit*; ſo alſo in writs of inquiry; ſo alſo in writs to the biſhop *de Cler. admittend.* (*b*). The books called *Officina Brevium* (*c*) and *Theſau. Brevium* (*d*) call it a *quare impedit*; and ſo do many ſtatutes. If now in ſtatutes, and in judicial records, it is known by the name of *quare impedit*, why may it not in writs of error?

THE SERJEANT then went on to take exceptions to the original record.

Hob. 163. FIRST, Though in a *quare impedit*, both the plaintiff and the defendant may be actors, that muſt be underſtood when both are out of poſſeſſion; for when the defendant is in poſſeſſion, the plaintiff cannot recover unleſs he make a title, and the defendant is not obliged either to make a title or become actor.

SECONDLY, In a *quare impedit* the plaintiff muſt ſet forth both *ſeiſin* and *vacancy*; but here he has failed in both. * As to ſeiſin, the declaration ſtands thus, "*ſeiſitus fuit et inadvocatione eccleſiæ*;" here the "*et*" couples nothing, and "*ſeiſitus*" refers to nothing.—As to the vacancy; the record is thus, "*eccleſia præd. vacavit per ceſſionem, &c.*" Now this is pleading a conſequence, without ſetting forth the act, of which this is a conſequence; it ought to have been pleaded thus, that the parſon was made a biſhop, or advanced to a living incompatible, &c. as the fact was, *per quod eccleſia præd. vacavit.*

* [310]

THIRDLY, The concluſion is, "*et hoc paratus eſt verificare*," inſtead of "*inde producit ſectam*," and ſo no ſuit before the Court. This is not mere matter of form.

FOURTHLY, That the *venire* was returnable upon a day certain; whereas in a *quare impedit* it ought to have been returnable upon one of the common return days (*e*). This therefore is a diſcontinuance; and not helped by the ſtatute of Jeofails, becauſe the king is party (*f*).

MR. DENTON *contra.*

FIRST, As to the objection about ſeiſin, the word "*et*" may be left out, or tranſpoſed thus, "*et de feodo et de jure.*"

SECONDLY, As the objections concerning the vacancy, and the *paratus verificare*, admit of this anſwer, that advantage might poſſibly have been taken of them by demurrer, which advantage is loſt by taking iſſue.

THIRDLY, As to the *venire*; it was anſwered, that there are two *venire*'s, and to the firſt there is an entry of *vice-comes non*

(*a*) Maynard's Edward the Second, in Mich. 10. *Edw.* 2. folio 300.
(*b*) Raſtal Ent. 502. pl. 1. 2. 4. 5. 8. 10. and Raſt. Ent. 507.
(*c*) Off. Bre. page 9.
(*d*) Theſ. Bre. page 1.
(*e*) Noy, 120.
(*f*) Tutchin's Caſe, Salk. 51.

miſit

miſit breve, and the ſecond is returnable upon a common return day.

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THE COURT. The objection of the ſeiſin is the ſtrongeſt; for it is nonſenſe at preſent, and every thing may be cured by leaving out and putting in. Poſſibly in tranſcribing the record, "*de*" was omitted; and if the fact be ſo, it * may be ſet right by a *certiorari*. "*De et inadvocatione*" would be well.

* [311]

As to the omiſſion of the *inde producit ſectam*, this would have excuſed the defendant in not anſwering; but in fact he has anſwered it.

As to the calling of the writ *quare impedit*, inſtead of *quod permittat*; the fact is, that there was formerly a writ of *quare impedit*, now out of uſe; and the writ *quod permittat*, is now erroneouſly called by the name of *quare impedit*. This error has prevailed in judicial writs, and acts of parliament; but never yet in writs of error. However, it being become now a legal name, the writ of error ought not to be diſallowed for uſing of it.

As to the objection to the return of the writ of error, it ſeems to be wrong. *Capital. Juſtic.* without his name, or RICHARD COX *infra nominat.* had been well: however, ſince ſeveral writs of error from *Ireland* have been returned in the very ſame manner, this ought to be allowed.

As to the objection about pleading the vacancy; it ought to have been pleaded as brother SALKELD would have had it; but the vacancy is admitted, by their pleading a preſentment under it.

Adjournatur.

Stafford *againſt* Forcer, Adminiſtrator of William Moore. Caſe 158.

THIS WAS AN ACTION UPON THE CASE, upon ſeveral promiſes. As to the ſecond promiſe, the plaintiff declared in this manner, that *William Moore*, the inteſtate, gave a note to him the plaintiff, bearing date the firſt of *December* 1704, and reciting, that whereas *Stafford* had, at the ſpecial inſtance of the inteſtate, lent to * *Auguſtin Moore*, brother of the inteſtate, the ſum of one hundred pounds, and whereas the ſaid *Auguſtin Moore* had given his bond for the repayment of the ſame, upon the ſecond of *June* following with intereſt; and for further ſecurity had given a warrant of attorney to confeſs judgment upon the ſaid bond; the ſaid inteſtate promiſed, if the ſaid *Auguſtin Moore* did not repay the ſame with intereſt, upon the ſecond of *June* following, purſuant to the condition of the bond, that then he would pay the ſame with intereſt. Ayers, &c.

In a declaration on note, dated 1ſt of *Dec.* 1704. Stra. 21.

* [312]

STAFFORD *againſt* FORCER, ADMINISTRATOR OF WILLIAM MOORE.

To this the defendant pleads *cauſa actionis non accrevit, &c. (a)*. Verdict for the plaintiff.

IT WAS MOVED *in arreſt of judgment*, that notwithſtanding the jury had found for the plaintiff, he could not have judgment; becauſe it appears upon the face of the declaration, that the cauſe of action did accrue above ſix years before the death of the inteſtate; for the cauſe of action accrued from the ſecond of *June* following the firſt of *September* 1704.

IT WAS URGED in anſwer, that the Court ſhould take notice of the common practice of not putting bonds in ſuit while the intereſt was duly paid; that this was the caſe here, that the obligor did for ſome time duly pay the intereſt; and this moved the jury to find as they did, for it was contended that the cauſe of action did not ariſe until the obligor made default in payment of intereſt.

*[313] * It was urged, that the note was only the form of the promiſe, and evidence of it; and therefore if a promiſe made without a note be capable of continuance, a promiſe by note muſt be ſo too. In 1. *Ventris*, 191. it is held, although it did appear by the declaration that the cauſe of action did ariſe above ſix years, &c. that yet the defendant ſhould not take advantage of it without pleading it. In *Raym.* 86. the plaintiff declared as executor, upon a promiſe thirteen years ago; and *non aſſumpſit infra ſex annos* was pleaded, and on replication, *aſſumpſit, &c.* iſſue was joined, and verdict and judgment for the plaintiff; for though the replication was a departure from the declaration, the defendant ſhould have demurred to the replication, inſtead of joining iſſue. Here the declaration aided by a verdict.

Ante, 251, 252.

THE COURT. There is a difference between declarations upon *a parol promiſe*, and *a promiſe by note*; in the former, the day is not material, in the latter it is. The iſſue here is upon a promiſe by this very note; and therefore impoſſible in the nature of the thing, that an evidence of a ſubſequent promiſe, or a ſubſequent note, can prove a promiſe by this note. As to the common practice of not putting a bond in ſuit, until the intereſt, &c. the anſwer is, that default of paying the intereſt would never give a cauſe of action, unleſs there were one before. According to this note, upon the non-payment upon the ſecond of *June*, *cauſa actionis accrevit*. A verdict will cure anything that a verdict can cure; but not where upon the declaration it manifeſtly appears, that no evidence whatever can maintain the iſſue. Formerly it was held, that the parties ſhould not take advantage of the ſtatute of Limitations without pleading it. But now the law is otherwiſe. The caſe of *Dean v. Crane (b)* was to this purpoſe: there was a promiſe to the executor within a year before the action brought; but the iſſue joined was, whether the * promiſe was made to the teſtator within ſix years before the action brought; verdict for the

1. Salk. 28.

*[314]

(a) The plaintiff replied a bill filed in the twelfth year of *Queen Anne*. 1. Stra. 22.

(b) 1. Salk. 28.

plaintiff;

plaintiff; it was moved in arreſt of judgment, that it appeared upon the face of the declaration, that the teſtator was dead above ſix years before the bringing the action; and therefore, &c. *Lord Chief Juſtice* HOLT was of opinion, at firſt, that the verdict had cured it; but afterwards it was reſolved, by the opinion of all the Judges, that this was a defect impoſſible for a verdict to cure. In the caſe of *Heylin v. Huſkins* (*a*) there was a queſtion, Whether a bare acknowledgment of a debt amounted to a new promiſe? and it was reſolved that it did not. But in that caſe there was an expreſs promiſe, upon which the plaintiff declared, *viz.* "I deny that "I owe you anything; prove it, and I will pay you."

STAFFORD *againſt* FORCER, ADMINISTRATOR OF WILLIAM MOORE, 1. Salk. 29.

The judgment in the principal caſe was arreſted.

ANOTHER OBJECTION was taken, that here bringing of the action for the intereſt, as well as the principal, vitiates the whole. 2. *Rolle's Rep.* 47. a.

Intereſt of money.

PARKER, *Chief Juſtice.* As to the intereſt, we are upon an expreſs promiſe; and an expreſs promiſe to pay intereſt, or money won at play, will ſupport an action.

(*a*) 1. Salk. 29.

EASTER

EASTER TERM,

The First of George the First,

IN

The Court of Chancery.

Cowper, *Lord Chancellor.*
Sir John Trevor, *Knt. Maſter of the Rolls.*

Champney *againſt* Champney.

Caſe 159.

Portions. Marriage ſettlement. Conſtruction of it.

IN a marriage ſettlement, a power was lodged in truſtees to raiſe three thouſand pounds for a daughter, to be paid to her at the age of twenty-one years, or day of marriage, which ſhould firſt happen, when *Champney* and his wife ſhould die without iſſue male; and in the mean time a hundred pounds a-year to be paid her for her maintenance.

COWPER, *Lord Chancellor*, reſolved, upon the authority of the *Duke of Southampton's Caſe (a)*, that the words "when *Champney* and his wife ſhould die without iſſue male," amounted to a *condition precedent*; and that the time of raiſing the portion, did not commence when one of them ſhould be dead without iſſue male, and ſo the other be tenant in tail, *après poſſibilité d' iſſue extinct*, but when both of them ſhould be dead without iſſue male.

* RESOLVED, That "the mean time" in which the hundred pounds a-year was payable for a maintenance, muſt neceſſarily relate to the intermediate time between the raiſing the money and her attaining the age of twenty-one, or day of marriage. * [315]

(a) 2. Freeman, 186. 1. Vern. 338.

EASTER

EASTER TERM,

The Firſt of George the Firſt,

IN

The King's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Pratt, *Knt.*
} *Juſtices.*

Sir Edward Northey, *Knt. Attorney General.*
Nicholas Lechmere, *Eſq. Solicitor General.*

Temple *againſt* Welds.

Caſe 160.

Money depoſited on a wager, in the hands of a ſtake-holder, becomes the property of the winner the moment the wager is decided.

AN ACTION of *indebitatus aſſumpſit* was brought for money received by the defendant to the plaintiff's uſe.

Upon evidence the caſe came out thus:

The plaintiff and another laid a wager; the defendant held the ſtakes; the plaintiff brought evidence that he had won the wager.

BLENCOWE, *Juſtice*, who tried the cauſe, was of opinion that the plaintiff had miſtaken his action; becauſe this money could not, at the time of the action brought, be ſaid to be money received to the plaintiff's uſe, ſince the defendant was not to pay the money, until the wager was proved to be won; and the plaintiff was nonſuited.

The plaintiff now moved to ſet aſide his own nonſuit; becauſe it was occaſioned by the Judge's miſtaking the law.

THE

TEMPLE *againſt* WELDE.

THE COURT. The action is well brought; for upon the wager won, the money was actually the plaintiff's, though he could not receive it before the fact was made appear.

Sed adjournatur.

* [316]

Caſe 161.

Betts, Executor of ——, *againſt* Mitchell.

If a promiſſory note be given to *A.* as executor of *B.* yet he need not, in an action on this note, name himſelf executor, and therefore he cannot join in the ſame declaration the promiſe made to himſelf with other promiſes made by the drawer of it to the teſtator.

ACTION UPON THE CASE was brought for ſeveral promiſes made by the defendant to the teſtator. As to the fifth promiſe; the plaintiff declared, that the defendant, on the thirteenth day of *Auguſt* 1713, made a promiſſory note to him as *executor* of ſuch a one, payable to the * plaintiff or order; and then concluded, that the defendant, not minding his promiſe, did not pay, &c.

To this declaration the defendant demurred.

IT WAS INSISTED upon, that this fifth promiſe was of ſuch a nature, as could not be joined with other promiſes made to the teſtator. For though the note is made to him *as executor*, that is only a deſcription of his perſon. The note is payable to the plaintiff or order; and by virtue of the ſtatute concerning promiſſory notes, it is transferrable by indorſement; and the indorſee might maintain an action. It is as much a new contract, as if a bond had been given to the plaintiff for this money. The defendant cannot plead to this note "*plene adminiſtravit*;" but muſt plead *non aſſumpſit*. The plaintiff might have brought an action upon this note, without naming himſelf *executor*. This note will go to the adminiſtrator of the executor, and not to the adminiſtrator *de bonis non*, &c.

THE COURT was clearly of this opinion, and gave judgment for the defendant *niſi (a)*.

(*a*) See Cockerill *v.* Kynaſton, 4. Term Rep. 280.

* [317]

Caſe 162.

Joſſelyn *againſt* L'Acier.

A bill requiring the drawee to pay ſo much "out of the "growing ſubſiſtence of the "drawer," is not *a bill of exchange*; and a promiſe to pay it *ſecundum tenorem billæ*, will not ſupport an action.

S. C. ante, 294.

S. C. Fort. 281. 1. Stra. 24. 1. Will. 262.

PARKER, *Chief Juſtice*, delivered the opinion of THE COURT.

In this caſe, two points are conſiderable: FIRST, Whether this be a good bill of exchange? WE ARE ALL OF OPINION, that it is not a bill within the cuſtom of merchants; it concerns neither trade nor credit; it is to be paid out of the growing ſubſiſtence of the drawer; if the party die, or his ſubſiſtence be taken away, it is not to be paid. * It may be never paid, and yet his credit unimpeached; it is not payable "*to order*," nor "*for value received.*" It does not appear, whether the party that is to receive it, is to receive it upon account of a former debt, or is to receive a bounty.

JOSSELYN *against* L'ACIER.

As to THE SECOND POINT, *viz.* Whether if the bill, by cuſtom of merchants, is not a good bill of exchange, it may not be ſupported by the promiſe? ALL OF US ARE OF OPINION that it cannot. For as to that matter it ſtands thus, *quorum præmiſſorum ratione, &c.* and *in conſideratione inde* he promiſed to pay, &c. The word "*inde*" plainly refers to the bill, as ſupported by the cuſtom; and conſequently if that fails, the conſideration muſt do ſo too.

The judgment was reverſed.

MICHAELMAS TERM,

The Second of George the Firſt,

IN

The King's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Pratt, *Knt.*
} *Juſtices.*

Sir Edward Northey, *Knt. Attorney General.*

John Forteſcue Aland, *Eſq. Solicitor General.*

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* Dorſet *againſt* Chaplin. Caſe 163.

WRIT OF ERROR out of the court of common pleas. The error aſſigned was, the want of an original.

Though after a verdict, want of an original is, yet an ill original is not, aided by ſtatute of Jeofails.

Upon a return to a *certiorari*, directed to the *cuſtos brevium*, it appeared, that the original was a *quare clauſum fregit*.

IT WAS URGED, that this is an improper *original* for an action of debt. And though after a verdict, the want of an original is aided by the ſtatute of Jeofails, yet an ill original is not aided.

5. Co. 37. Salk. 267.

TO THIS *it was anſwered*, that a *quare clauſum fregit* is no original in an action of debt; and therefore the caſe is to be conſidered as if there was no original at all.

TO THIS *it was replied*, that the certificate from the proper officer, was the only way of trying what the original in the action was; and he has certified, that a *quare clauſum fregit* was the original; and this certificate the Court is bound to give credit to (*a*).

(*a*) Cro. Jac. 108. 479. Cro. Car. 272. 281. Noy, 4. Yelv. 108. 1. Brownl. 96.

DORSET *againſt* CHAPLIN.

* THE COURT was of the ſame opinion, and would have reverſed the judgment, becauſe of an ill original.

But MR. REEVES deſiring to ſpeak to it,

Adjournatur.

Caſe 164. Leeds *againſt* Carlton.

If a perſon ſue in the ſpiritual court for a matter which, upon the face of the proceedings, is out of its juriſdiction; yet on judgment againſt him by default, on a declaration in prohibition, the jury, on a writ of enquiry, can only give damages for the proceedings ſubſequent to the iſſuing of the prohibition.

A MAN ſues in the ſpiritual court for a matter, which, upon the face of the libel, appears to be of temporal conuſance, and obtains a ſentence. The defendant appeals firſt, and then ſues out a prohibition. In the declaration upon that prohibition, and proceſs thereupon, there is judgment againſt the defendant, by *nil dicit*; and writ of inquiry of damages awarded.

It was now debated, whether damages were to be given by the jury upon the writ of inquiry, for the proceedings in the ſpiritual court, from the beginning of the ſuit in that court; or only for the proceſs in that court, ſubſequent to the delivery of the writ of prohibition.

WHITAKER, *Serjeant*, contended, that the plaintiff in prohibition was to have damages in this caſe, for all the proceedings in the ſpiritual court, from the beginning of the ſuit; becauſe the matter appearing upon the face of the libel to be of temporal, not ſpiritual conuſance, that was in point of law a prohibition to proceed; and their proceeding at all was both an injury to the party, and a contempt to the crown. He laboured to maintain this difference, that where the matter was originally of ſpiritual conuſance, and became temporal only *propter defectum triationis*, there damages were to be recovered only for proceedings after a prohibition; but that where the matter was originally of temporal conuſance, there the law was itſelf a prohibition; and to this purpoſe he quoted 2. *Inſt.* 299. *Fitzherbert Abr. pl.* 15. *tit. Prohibition. The Year-Book* 9. *Hen.* 6. *pl.* 56. *Cro. Car.* 559. *W. Jones*, 447.

* [320] * DARNELL, *Serjeant*, on the other ſide. This is a declaration upon a prohibition in the common form. The chief thing complained of, is proceeding in contempt of the prohibition delivered. The jury upon the writ of inquiry are to inquire *de præmiſſis*, VIZ. the thing complained of in the declaration, which is the contempt of the prohibition. Were the law as *Serjeant* WHITAKER would have it, the plaintiff ſhould have declared in another manner. Poſſibly in a declaration upon a prohibition, ſetting forth, "WHEREAS all cauſes, unleſs teſtamentary or matrimonial, are "of temporal conuſance, &c. that yet, &c." as in *Raſtall's Entries*, 485. the law may be with them; and yet in thoſe very caſes, iſſue is often joined upon this very point, *viz.* proceeding after prohibition delivered, &c. For the ſheriff to take upon him to judge what things are of ſpiritual, and what of temporal conuſance, would

would be a thing of a dangerous nature; and yet this muſt be the conſequence, if, &c.

LEEDS *againſt* CARLTON.

PARKER, *Chief Juſtice*, was of opinion, that damages were to be given only for the proceedings in the ſpiritual court ſince the prohibition delivered. This is a ſpecial action for proceeding in contempt of the prohibition; this is the very giſt of the action; upon this iſſue is conſtantly joined, which, according to what is now contended for, muſt be an immaterial iſſue; for if the iſſue be found with the defendant, that he has not proceeded after the prohibition delivered, yet if he had proceeded at all, the plaintiff muſt have judgment for his damages. Nay, according to this doctrine, the very pleading this plea, in this ſort of action, is very impertinent; and upon doing which, the plaintiff may ſign his judgment; for he ought not to plead, "that he did not proceed after prohi-"bition, &c." but "that he did not proceed at all." * No action lies againſt a man for ſuing in the ſpiritual court, where he has no right. Prohibition is to the Judge, not to the party; and in this caſe, this not a prohibition to the firſt Judge, but to the Judge upon the appeal. A further circumſtance of the unreaſonableneſs of what is aſked for, is, that the party deſires to have his damages, for the charge, proceſs, and delay occaſioned by his own appeal. In a prohibition, two things are to be conſidered: Firſt, Whether the party is to be puniſhed? Secondly, Whether he is to be eſtopped? His not proceeding after the prohibition delivered, prevents his puniſhment, and excuſes him from contempt; but cannot hinder the plaintiff of his judgment. If upon this iſſue, whether the defendant did, or did not proceed after prohibition delivered, verdict be found for the defendant, no coſts is ever given. The late ſtatute about giving coſts was unneceſſary, if this doctrine had been true.

*[321]

And of this opinion was the Court.

But PRATT, *Juſtice*, heſitating, the caſe was adjourned.

The King *againſt* Darrel.

Caſe 165.

UPON A TRIAL AT BAR for compaſſing the death of the king, it was debated, Whether a promiſe of pardon did not diſable a man from being a witneſs?

A promiſe of a pardon does no diſable a man from being witneſs.

THE COURT reſolved, that this was an objection never allowed, and of no weight. Treaſon and ſuch like crimes are not to be diſcovered but by the accomplices, who will never be prevailed with to give evidence, but in expectation of a pardon. Several acts of parliament have encouraged the diſcovery of crimes, by the promiſe of a pardon. As to * the opinion in *Keyling*, of LORD CHIEF BARON HALE to the contrary, he was over-ruled by the reſt of the Judges.

Conſpiring to levy war, is an overt act of compaſſing the death of the king.

THE COURT reſolved, that a conſpiring to levy war in order to dethrone the king, which is the civil death of the king, is an overt act to prove the compaſſing the death of the king. But that a conſpiring to levy war generally, is not an overt act to prove the compaſſing the death of the king; becauſe there may be ſuch a levying war as may be treaſonable, without any intention of depoſing the king; as pulling down incloſures, bawdy-houſes, &c. The opinion of KEYLING, *Chief Juſtice (a)*, as oppoſed to LORD COKE (*b*), was held for good law.

(*a*) Key. 20 (*b*) 4. Inſt. 6.

HILARY

HILARY TERM,

The Second of George the First,

IN

The King's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
John Forteſcue Aland, *Eſq. Solicitor General.*

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* Baldwin *againſt* Church.

Caſe 166.

WRIT OF ERROR out of the court of common pleas.—The original action was an action of debt for twenty pounds, againſt two executors. The one pleaded *plene adminiſtravit* as to all the aſſets in his hands, *præter* forty ſhillings, and concluded *quare actio non*; the other pleaded *plene adminiſtravit* generally. The plaintiff demurred generally to both pleas, and judgment was given in the court of common pleas for the defendants, and a writ of error brought.

If one of two executors plead *plene adminiſtravit præter* 40s. and conclude in bar; and the other plead *plene adminiſtravit* generally; the firſt plea is bad.

S. C. 1. Stra. 20. Rolle's Ab. 928. pla. 5. Raſtal, 309. b. pla. 9.

MR. YORKE *for the plaintiff in error.* If a man take upon him to plead to the whole, and then plead ſuch a plea as goes but to part of the action, the plea is bad for the whole. A plea is in its nature intire, and cannot be good in part, and void or bad for the reſt. The defendant has here pleaded, in bar to the action, ſuch matter, as amounts to a confeſſion of the cauſe of action; and conſequently, that the plaintiff ſhould have recovered. The defendant ſhould in this caſe have confeſſed the cauſe of action, that he had aſſets

BALDWIN *againſt* CHURCH.

unadminiſtered * to ſuch a value, and was ready to pay, as far as his aſſets would enable him. The plaintiff had good cauſe of demurrer, if one of the defendants pleas be ill; and the court of common pleas ought not to have given judgment for the defendants.

Salk. 262. The ſame judgment is to be given by this Court, as the court of common pleas ought to have given againſt both defendants; and that judgment ought to have been againſt both defendants *de bonis teſtatoris*, and *de bonis propriis* of that executor that pleaded an ill plea, as to damages and coſts. For each executor has by law an intereſt in, and power over the whole eſtate; and therefore it is, that the plea of each executor ſhall bind the eſtate of the teſtator. If it be objected, that the plaintiff has committed a miſtake in his demurring, by uſing the word "*placitum prædictum*" in the ſingular number; it may be anſwered, that "*placitum*" is *nomen*

Salk. 219. *collectivum*, and to be taken *reddenda ſingula ſingulis*, according to 1. *Saunders*, 338 *(a)*.

THE COURT. The judgment muſt be reverſed; and the ſame judgment given here, as ſhould have been given in the court of common pleas. The plaintiff muſt take care to take his judgment rightly. The plea is undoubtedly ill; for it ſets forth ſuch matter as ſhews plainly, that the plaintiff has good cauſe of action, and yet concludes *quare actio non*, which imports, that the plaintiff ſhould not have brought this action at all. If a man bring an action of debt for twenty pounds, and the defendant plead, that he has paid forty ſhillings, and conclude *quare actio non*, it would be bad; and yet here the plaintiff might have brought his action for the eighteen pounds only; whereas in the caſe of an executor, the creditor muſt bring the action for the ſum, the debt that is really due,

* [325] let the aſſets be never ſo ſmall. * The reaſon why, though the aſſets be very ſmall, yet judgment muſt be for the whole debt, ſeems to be for the preventing a freſh action, in caſe of more aſſets *(b)*

(*a*) Caſes quoted *arguendo*, 1. Roll. Abr. 805. 928. The Year-Book 7. *Edw.* 4. fo. 8.; the 9. *Edw.* 4. fo. 13.; the 21. *Hen.* 6, 45. Dyer, 210. Cro. Eliz. 318. Cro. Car. 167.

(*b*) It is ſaid, that the judgment of the common pleas was reverſed, and a new judgment given by the court of king's bench for the plaintiff againſt one of the defendants only. See Elwell v. Quaſh and Others, 1. Stra. 20.

Caſe 167.

Taylor *againſt* Matthews.

If a plaintiff die, pending conſideration of the Court, judgment may be entered without continuances,

IF, pending the conſideration of the Court, the plaintiff die, judgment may be entered without entering the continuances; and then it will have relation to the *day in bank (a)*. A conti-

(*a*) See the caſe of Sir Ambroſe Farnel v. Tipper, Latch, 92. Iſley's Caſe, 1. Leon. 187. Lure v. Reſt, Ante, 30. and Ballard v. Delander, 2. Stra. 785. Caſes Temp. Hardw. 205.

nuance

nuance is nothing but a "*Curia adviſare vult.*" Though the time when in fact the judgment was given, muſt be entered on THE ROLL, that is only in reſpect to land, that it may not be bound until the time of the judgment given, and ſo purchaſers over-reached. Before this inconvenience was provided againſt by the ſtatute 29. *Car.* 2. c. 3. there might have been an inconvenience in entering judgment without continuances; there can be none NOW.

TAYLOR *againſt* MATTHEWS. Salk. 401.

EASTER

EASTER TERM,

The Second of George the Firſt,

IN

The King's Bench.

Sir Thomas Parker, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Powell, *Knt.*
} *Juſtices.*

Sir Edward Northey, *Knt. Attorney General.*

John Forteſcue Aland, *Eſq. Solicitor General.*

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* Herſon *againſt* Aglionby. Caſe 168.

THE PLAINTIFF brought a writ of error to reverſe a common recovery; and the defendant moved for liberty to *plead double.*

On a writ of error to reverſe a common recovery, the defendant in error may, by the leave of the Court, plead double.

The motion was oppoſed, becauſe the ſtatute 4. & 5. *Anne*, c. 16. for the amendment of the law, whereby a defendant, by the leave of the Court firſt obtained, may plead double, was not to be underſtood of a defendant in a writ of error, but a defendant in an original action.

Co. Lit. 304. Hob. 295. Fort. 336. 1. Wilſ. 223. 5. Com. Dig. "Pleader" (E. 2.).

THE COUNSEL *for the motion* inſiſted, that this ſtatute extends to the defendant in a writ of error as well as to the defendant in an original action; that the one might have as great occaſion of pleading double as the other; that it had lately been reſolved, that a writ of error did not abate by the death of one of the plaintiffs, whereas, as the law ſtood before that act of parliament, it would; that by the ſame reaſon by which the word "plaintiff" in that part of the act of parliament was to be extended to a plaintiff in error, the word "defendant" ſhould likewiſe. * It was further urged, that the pleading double was at their own peril; for if the Court had not power, by this act of parliament, to grant them leave to plead double, the other ſide may demur.

THE

HERSOM *againſt* AGLIONBY.

THE COURT inclined to this opinion, but made their motion fruitleſs (*a*), by declaring, that one of the things they deſigned to plead did, upon the record, appear to be falſe.

(*a*) But ſee the caſe of Ward *v.* The Charitable Corporation, that the Court will not, on a motion to plead double, take into conſideration whether it be a good plea or not, Caſes T. H. 126.; but if it be bad, they will give leave, on terms, to withdraw it, Jefferies *v.* Walter, 1. Wilſ. 177. Nichols *v.* Sutcliffe, Caſes T. H. 56.

Caſe 169.

Rench *againſt* Britton.

A declaration in debt on bond, conditioned, "that if the "defendant ap- "pear to an- "ſwer *A. B.* "of a plea of "treſpaſs, and "alſo a bill," is good, although the writ be, "and alſo of a "bill *of the ſaid* "*A. B.*"

DEBT UPON BOND. The condition, upon *oyer*, was, "That "if the defendant did appear, &c. to anſwer the aforeſaid "*John Rench* of a plea of treſpaſs, *ac etiam billæ*." The defendant pleaded the ſtatute 23. *Hen.* 6. c. 9. about ſheriff's bonds: and the plaintiff demurred.

IT WAS INSISTED *for the defendant in demurrer*, that the condition of the bond varied from the writ. THE WRIT was, "to an- "ſwer the aforeſaid *John Rench* of a plea of treſpaſs, &c. *ac etiam* "*billæ ipſius Johannis*;" which words "*ipſius Johannis*" are omitted in the condition of the bond; and that this ſtatute, being made to prevent oppreſſion, was to be taken ſtrictly; and ſeveral caſes were cited (*a*) to prove, that the leaſt variation or addition to the condition of the bond not warranted by the ſtatute makes the whole bond void. But the caſe chiefly relied upon, as a caſe in point, was *Moore v. Finch* (*b*), where the action was debt upon bond, conditioned "to appear before *his Majeſty* at *Weſtminſter*, "to anſwer *A.* of a plea of treſpaſs, and alſo of a bill to be exhi- "bited againſt him for a hundred pounds;" the defendant pleaded the ſtatute of 23. *Hen* 6. and ſhewed, that the writ was to appear *coram dom. rege* at *Weſtminſter*, &c. and the plaintiff demurred; [328] and upon argument, the * opinion of the Court was againſt the plaintiff, becauſe the condition of the obligation was to appear before *his Majeſty*; whereas it ought to have been *coram dom. rege*: and becauſe it was not ſaid in the condition, whoſe bill he is to anſwer; for it ſhould have been "*ipſius A.*"

BRANTHWAYT, *Serjeant*, inſiſted, that it muſt be intended the bill *of the plaintiff*; and quoted caſes to ſhew, that bonds varying in ſome minute circumſtances from the ſtatute have been ſupplied by intendment. In the caſe of *Kirkbridge v. Curwan* (*c*), the condition of the bond to appear "before the King's Juſtices at "*Weſtminſter*;" it was objected, that this was not the title of the court; yet held good. In the caſe of *Wells v. Denton* (*d*) it is ſaid, that the ſtatute does not preſcribe any form for the condition of the bond. In the caſe of *Villers v Haſtings* (*e*), condition of the bond to anſwer the plaintiff *de placito debiti* only; and the writ was to anſwer in a ſum certain; and yet held well.

(*a*) Year-Book 37. *Hen.* 6. fo. 1. 10. Co. 100. Plowd. 68. Hob. 13.
(*b*) 2. Lev. 177.
(*c*) T. Jones, 46. 2. Lev. 123.
(*d*)
(*e*) Cro. Jac. 286.

PARKER,

PARKER, *Chief Juſtice.* The ſtatute only requires, that the ſheriff ſhould take a bond conditioned for the appearance of the party ſuch a day "at *Weſtminſter*;" it is not ſaid even "to "anſwer the plaintiff." The appearance mentioned is a perſonal appearance. The *ac etiam billæ* goes only to the matter of bail, whether common or ſpecial is to be required, and came in uſe after the ſtatute. If the whole writ might be omitted, as certainly it may ſince the ſtatute does not require it, then any part of it may be ſo likewiſe; nor does this bond vary from the form preſcribed by the ſtatute. If the party appear, he is bound to anſwer any bill that ſhall be filed againſt him. The bill in the condition of the bond cannot be intended of any other than the bill of the plaintiff.

RENCH *againſt* BRITTON.

The reſt of THE COURT being of the ſame opinion, judgment *niſi* was given for the plaintiff.

* [329]

* Stone *againſt* Taverner.

Caſe 170.

ACTION OF DEBT UPON BOND. Upon *oyer*, the condition of the bond appeared to be, "WHEREAS *Stone* having lent "*Taverner* the ſum of one thouſand pounds, for the better ſecuring "of which *Taverner* has executed to *Stone* an indenture purport-"ing to be a deed of mortgage, &c. THE CONDITION of this "obligation is ſuch, that if *Taverner* ſhall from time to time well "and truly pay the intereſt that ſhall become due, according to "the *proviſo* in the indenture, until the principal be paid, then, "&c." The defendant pleaded, that he had paid *tantum quantum* became due; to which plea the plaintiff demurred.

In an action of debt on bond, ſtating, that *A.* having lent *B.* 1000*l.* *B.* had given him a mortgage-deed, conditioned, that if *B.* ſhould pay the intereſt until the principal was paid, that then the bond ſhould be void, it is not neceſſary to aſſign a breach; for the indenture need not be ſet forth.

SQUIB *for the plaintiff.* The defendant's plea is ill; becauſe he has not ſhewn what was due, nor what he paid; ſo that no iſſue could be taken upon it (*a*). In the caſe of *Halſey v. Carpenter* (*b*), the bond was conditioned to pay *J. S.* and *J. N.* ſo much money *tam cito* as they came of age; and judgment was given upon demurrer for the plaintiff, becauſe the defendant did not ſay when they came of age.

PARKER, *Chief Juſtice.* I am in doubt in this caſe whether, though the defendant's plea be admitted bad, you can recover without aſſigning a breach of the condition of this bond, as this caſe is circumſtanced.

EYRE, *Juſtice.* The plea of the defendant is undoubtedly naught; becauſe this being a bond for the performance of covenants in the indenture, the indenture ought to have been ſet forth by the defendant; whereas all that we know of the indenture is by way of recital in the bond.

PARKER, *Chief Juſtice.* The indenture need not be ſet forth. This is not a bond for the performance of the indenture; for that is in the nature of a deed of mortgage for a year, and is a ſecurity for

(*a*) Year-Book 20. *Hen.* 6. pl. 31. (*b*) Cro. Jac. 359.

the

STONE *againſt* TAVERNER.

the repayment of * the principal ſum with a year's intereſt; whereas the bond is a ſecurity, not for the principal, but intereſt; nor for a year's intereſt only, but for the intereſt of a thouſand pounds until it be paid, which now appears to be nine years more than the deed. As for thoſe words in the condition of the bond, "according to the *proviſo* in the indenture," they muſt neceſſarily and can relate only to the proportion of the intereſt.

A plea of payment to executors muſt ſhew that the teſtator is dead.

MR. SQUIB, ſeeing the Court thus fluctuating in their opinions, took another objection to the plea of the defendant. The condition of the bond was, "to pay to *John Stone*, his executors, "adminiſtrators, and aſſigns;" and in his plea the defendant ſays, that "he paid to *Robert Stone* the intereſt that from time to time, "&c.;" and does not ſhew that *John Stone* is dead, or that *Robert* is his executor.

Judgment was given for the plaintiff.

Caſe 171.

Child *againſt* Pierce.

Quære, Whether a declaration by aſſignees of a bankrupt, for ſo much money had and received by the defendant *from the bankrupt*, without averring it to be *the money of the bankrupt*, is good.

THIS was an action upon the caſe upon ſeveral promiſes, brought by the plaintiffs as aſſignees of a commiſſion of a ſtatute of bankruptcy againſt *J. S.*; and judgment paſſed by default; and writ of inquiry executed.

On a writ of error brought to reverſe this judgment,

IT WAS INSISTED, that the declaration of the plaintiffs was naught; for they declare, that the defendant was indebted to them, as aſſignees of a commiſſion of bankruptcy againſt *J. S.* in the ſum of three hundred and twenty pounds, for ſo much money had and received by the defendant from the bankrupt; and it is not ſaid, that the money was the money of the bankrupt. It was acknowledged, that in pleas of bar, which may be ſupported by common intendment, this way of * pleading might poſſibly be admitted, and the money be intended the money of the bankrupt; but not in a declaration, where the words ſhall ever be taken in the ſtrongeſt ſenſe againſt him that pleads them. Formerly, in actions of debt, the whole agreement was uſed to be ſet forth; but now of late, a more conciſe way of pleading has in actions upon the caſe obtained. And yet even now to declare in an *indebitatus aſſumpſit* for goods ſold and delivered would be naught upon demurrer.

* [331]

1. Sid. 171.
1. Lev. 173.
1. Show. 112.
3. Wilſ. 307. 304
1. Stra. 697.
Cowp. 570.
Vezey, 326.

IT WAS ARGUED *on the other ſide*, that this declaration was good; for that firſt of all this declaration ſets forth, that the defendant was indebted, and then goes on and ſhews how, *viz.* by money received by the defendant, *i. e.* by a neceſſary intendment, ſuch money as will create a debt, the money of the bankrupt. In the caſe of *Hicks v. Cockum* (*a*), judgment in the common pleas by default; and upon error brought it was inſiſted,

(*a*) Trinity Term, 12. *Anne.* Fort. 278.

that

that the declaration being for goods and merchandizes to the defendant *per eundem* the plaintiff before that time ſold and delivered, &c. and not ſaid the goods of the plaintiff, was naught; but the Court was of opinion, that the word "*indebitatus*" neceſſarily imported that they were the goods of the plaintiff. In the caſe of *Atherpe v. Jones* (*a*) there was judgment by default in the common pleas, and a writ of error brought; and the declaration ſet forth, that the defendant was indebted to the plaintiff in ſo much money for the uſe of a coach-horſe of the plaintiff's, delivered by the ſaid plaintiff to the defendant; and it was objected, that this delivery did not neceſſarily import a debt; for, poſſibly, the defendant might be to pay nothing for the uſe of him; but the Court were of opinion, that ſuch a delivery muſt be intended as did create a debt.

CHILD *againſt* PIERCE.

Adjournatur.

(*a*) Trinity Term, 1. Geo. R.

TRINITY

TRINITY TERM,

The Second of George the Firſt,

IN

The King's Bench.

Thomas *Lord* Parker, *Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
John Forteſcue Aland, *Eſq. Solicitor General.*

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* Clarke *againſt* Elwick. Caſe 172.

MOVED for a rule againſt a man to ſhew cauſe, why he ſhould not make an affidavit of his name being ſubſcribed to an arbitration-bond; ſeveral affidavits being produced, that he had ſeveral times owned his being a witneſs, but refuſed to make affidavit.

A witneſs to a bond of arbitration may, under 9. & 10. *Will.* 3. c. 15. be compelled, by rule of court, to make *an affidavit* of its execution.

IT WAS URGED, *in behalf of the motion*, that though it be generally true, that no man can be compelled to make an affidavit; yet it muſt not hold true in the preſent caſe, becauſe then the ſtatute 9. & 10. *Will.* 3. c. 15. will be entirely eluded, *viz.* "That all perſons that agree to end their differences by an arbi- "tration may agree to have this their ſubmiſſion made a rule of "any of the courts of record, and may inſert this their agreement "in the ſubmiſſion, or condition of the bond, or promiſe; and "upon producing *an affidavit* of ſuch inſerting, and upon reading "and filing ſuch affidavit, the ſame may be entered of record in "ſuch court; and a rule of court thereupon, &c."

S. C. 1. Stra. 1.

* THE COURT firſt made a rule upon him to ſhew cauſe, why he ſhould not make the affidavit deſired, and the next Term, *viz. Trinity*, they made the rule abſolute, being unanimouſly of opinion, that they had a power, by rule of court, to compel ſuch perſons as

CLARKE *against* ELWICK.

are witneſſes to an award to make affidavits of their being ſo. And whereas it was objected, that there were no compulſory words in the act of parliament, it was ſaid, that this was not neceſſary; that the very nature of the thing gave the Court a juriſdiction; that the perſon, by ſubſcribing his name as a witneſs, had undertaken to give evidence at a proper time, and in a proper manner; and that here, the act of parliament having made it neceſſary for the evidence to be given by affidavit, the refuſing to do it was an injury to the party concerned, in a matter belonging to the juriſdiction of this court (*a*).

On breach of an award made a rule of Court, the party may proceed both by *action* and *attachment* at the ſame time.

Salk. 73. 2. Term Rep. 643. 1. Burr. 278.

AND AS TO THE OBJECTION, that the party had here made and determined his election, which the law gave him, either to proceed by action upon the arbitration-bond, or to make the award a rule of Court, it was anſwered, that the party might at pleaſure reſort to this new remedy given by the ſtatute; and that though he ſhould even have got judgment upon the bond; for, perhaps, an attachment upon this rule of Court is a more quick and effectual proceſs than ſuing out an execution upon a judgment. On a writ iſſuing out of another court, and returnable here, the Court may compel the proper officer to make a return. *Similiter* the Court may compel the making an affidavit in the preſent caſe.

(*a*) A rule was accordingly made on the witneſs to make an affidavit of the execution of the bond, S. C. Stra. 1. And the like rule was made by the court of common pleas in Eaſter Term, 16. *Geo.* 2. Barnes Notes, 8vo edit. 58.

* [334]

Caſe 173. *The Pariſh of Elſing *againſt* The County of Hereford.

The county-gaol, as to ſettlements, is conſidered, as ſituate in every pariſh in the county.

S. C. 1. Seſſ. Caſ. 99. S. C. 2. Bott, 5. pl. 13.

PARKER, *Chief Juſtice*, the reſt aſſenting, ſaid, that THE GAOL of the county was, with reſpect to ſettlements, to be conſidered as ſituate in every pariſh in the county; that therefore the removing of a perſon to gaol did not make any alteration of the ſettlement; and that conſequently a baſtard-child born in the county-gaol was to be eſteemed as gaining a ſettlement by birth in that pariſh where the parent was ſettled when ſent to gaol.

Caſe 174. Harvey of Comb's Caſe.

Commitment for high treaſon generally, good.

FIRST, A commitment for treaſon generally, without expreſſing the ſpecies of treaſon, is good; for the proceſs is the ſame in one ſort of treaſon as in another,

1. Stra. 3. 3. Viner, 334. 2. Wilſ. 158. 2. Hawk. ch. 16. ſ. 17.

High treaſon bailable by the king's bench.

Salk. 103, 104. But ſee 8. Mod. 93, &c.

SECONDLY, The court of king's bench has power to bail in high treaſon, notwithſtanding the ſuſpenſion of the *Habeas Corpus* Act; and in *Lord Montgomery's Caſe* (*a*), upon an affidavit made that the priſoner was in ſuch an ill ſtate of health that longer confinement would bring his life in danger, it was done.

(*a*)

Carrington

Carrington *againſt* Warren. Caſe 175.

THE COURT was moved, that an executor, being likewiſe heir at law, might have leave to plead double, viz. *ſolvit ad diem*, and *riens per deſcent*, to an action of debt upon a bond.

An heir ſhall not have leave to plead *riens per deſcent* with another plea, except he make affidavit that he has *riens per deſcent*.

THE COURT refuſed the motion, without an affidavit, that he had *riens per diſcent*. The ſame law in the caſe of an * adminiſtrator, who ſhall not be allowed to plead *plene adminiſtravit*, and *no aſſets*, without affidavit. For this is a matter incumbent upon the plaintiff to prove, and yet it lies more in the knowledge of the defendant than the plaintiff. It is the duty of the Court not to aſſiſt the defendant, by giving leave to plead double, but upon probable ground that the demand of the plaintiff, *quoad* the defendant, cannot be maintained.

Bunb. 181, 182. Fort. 336. Caſes T. H. 243. 5. Com. Dig. 390.

The King *againſt* Dixon and his Wife. Caſe 176.

THIS was an indictment againſt *Dixon* and his wife, charging, that they, *et uterque eorum*, did unjuſtly and unlawfully, ſuch a day *et diverſis aliis diebus et vicibus tam antea quam poſtea*, keep a common gaming-houſe, *contra pacem et formam ſtatuti, &c.* To which indictment the defendant demurred.

An indictment will lie againſt a man and his wife jointly for keeping a gaming-houſe.

THE FIRST OBJECTION taken againſt the indictment was, that it ſhould not have been brought againſt the huſband and wife, but againſt the huſband only.

4. Bl. Com. 64. 167. Salk. 382. 384. 2. Ld. Ray. 197. 2. Burr. 1232. 2. Hawk. P. C. 135.

THE COURT. This objection would have weight in it if the property or the ownerſhip of the houſe was the matter in queſtion; but it ſignifies nothing here, where not the property, but the criminal management of the houſe (in which the wife may probably have as great, nay a greater ſhare than the huſband), is the fact charged. This caſe is not to be diſtinguiſhed from the caſe of *The Queen v. Williams* (*a*), which was an indictment againſt huſband and wife for keeping a bawdy-houſe, and held good; for as there the wife may be concerned in acts of bawdry, ſo here ſhe may be active in promoting gaming, and furniſhing the gueſts with all conveniencies for that purpoſe.

* [336]

* THE SECOND OBJECTION was, that it was charged in the indictment that they, *et uterque eorum*, kept a gaming-houſe, &c. which was wrong; for two perſons cannot jointly and ſeverally keep a houſe; the keeping of the houſe by the huſband and wife is not a keeping the houſe by the huſband only, or by the wife only. For this purpoſe was quoted 2. *Rolles*, 51. an indictment againſt four perſons for uſing the trade of a plumber, againſt the form of the ſtatute 5. *Eliz.* c. 4. ſ. 31.; and the indictment, which charged

An indictment againſt huſband and wife, *et uterque eorum*, for keeping a gaming-houſe, is good.

(*a*) Ante, 63. Salk. 384.

THE KING *against* DIXON AND HIS WIFE.

that they four *et uterque eorum* uſed the trade, was held naught, becauſe the uſer of the one could not be the uſer of the other.

Salk. 382.

THE COURT. The caſe in *Rolles* is not applicable to the preſent caſe; for there the uſing of the trade not being the offence, but the uſing of the trade without having ſerved an apprenticeſhip (an act to be performed by each ſingly and ſeverally), it was an offence that was in its own nature impoſſible to be committed jointly; whereas here this may be committed by both jointly, and the addition of *uterque eorum* is but a further ſpecifying and corroborating the former charge; for whoever ſays that *both* of them did keep, &c. does in truth and conſequence ſay, that *each* of them did ſo.

Keeping a gaming-houſe is a nuſance at common law.

THE THIRD OBJECTION was, that this indictment was upon a particular ſtatute, *viz.* the ſtatute 33. *Hen.* 8. c. 9. ſ. 18. and as it chalked out a particular method of proceeding for the recovery of forty ſhillings a-day, the party could not proceed by indictment.

THE COURT. The keeping of a gaming-houſe is an offence indictable at common law as *a nuſance*; nor will the concluſion of the indictment, *contra formam ſtatuti*, bar the party from ſupporting the indictment by common law, ſuppoſing it could not be maintained upon the ſtatute; for where a ſtatute creates or makes a thing an offence that was not ſo before by the common law, gives a certain penalty, and preſcribes a method for the recovery of it, there the act muſt be purſued; but it is otherwiſe of an offence at common law, for which an act gives a new penalty, or a new remedy; for there the remedy at common law ſhall not be taken away without negative words (*a*). * But it is clear, that an indictment is not taken away by any words in the ſtatute; ſo far from it, that there are words which, unleſs they have relation to proceeding by indictment, muſt have no ſenſe or ſignification at all; for it enacts, that the forfeiture may be ſued for "by action, "information, bill, *or otherwiſe*." And as all the remedies, or different ways of proceeding, beſides by indictment, are enumerated before, thoſe words "*or otherwiſe*" muſt be underſtood of indictments, or nothing.

* [337]

Salk. 460.

An indictment at common law for keeping a common gaming-houſe is good, though "*ad commune* "*nocumentum*" be omitted.

THE FOURTH OBJECTION was, that if this were to be conſidered as an indictment for a nuſance at common law, it would not be good for want of concluding, "*ad commune nocumentum* of the "king's ſubjects."

THE COURT. It is not neceſſary to conclude ſo here; the offence in its own nature importing that it is ſo. Beſides, the word "common" ſupplies this defect, if it were one.

On an indictment, for that *ſuch a day A.* kept a gaming-houſe, only one penalty can be recovered.

THE FIFTH OBJECTION was, that as this indictment was laid, the penalty of forty ſhillings a day, given by this ſtatute,

(*a*) See 4. Hawk. P. C. 5. *notis.*

could

could not be recovered; for it is not ſaid, that "*per ſpatium* of "one day, or ſeveral days, they kept, &c." but only that "ſuch "a day, &c."

THE KING *againſt* DIXON AND HIS WIFE.

THE COURT. Keeping a common gaming-houſe any part of the day is enough. Indeed more days might have been * laid; but the time is ſo uncertain as to all but one day, that only forty ſhillings are recoverable.

* [338]

The judgment was given for THE KING, unleſs, &c.

MICHAELMAS TERM,

The Third of George the First,

IN

The King's Bench.

Thomas *Lord* Parker, *Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Pratt, *Knt.*
} *Juſtices.*

Sir Edward Northey, *Knt. Attorney General.*

John Forteſcue Aland, *Eſq. Soliciter General.*

MEMORANDUM. POWYS, *Juſtice*, was abſent all this Term, being indiſpoſed with the gout.

Fazakerley, Chamberlain of London, *againſt* Wiltſhire. Caſe 177.

THE only queſtion was upon the validity of a bye-law in the city of *London* (*a*), that none but *free porters* ſhould intermeddle with the carrying or unloading of corn, ſalt, or ſea-coal, or any other goods, out of any barge, lighter, &c. between *Staines Bridge* and *Kendal* in the county of *Kent*, that are to be imported into the port of *London*, under the penalty of forfeiting twenty ſhillings for each offence, except in time of danger, and to ſave the loſing of goods.

The bye-law of the city of *London*, that none but *free porters* ſhall work in unſhipping of corn imported into *London* from any place between *Staines Bridge* and *Kendal* in *Kent*, is good.—S. C. 1. Stra. 462. 1. Salk. 143. 192. 2. Roll. Abr. 579. Hob. 85. 4. Co. 32. 6. Co. 60. 1. Vent. 71. 1. Mod. 47. 79. 3. Mod. 158. 5. Mod. 104. 1. Bar. K. B. 76.

(*a*) This bye-law was made in the eighteenth year of *James the Firſt*, *viz.* "THAT the corn porters ſhould be a "Company, with twenty-four aſſiſtants, "who were called free porters, who "ſhould work at a particular ſettled rate; "and that none but the free porters "ſhould intermeddle in importing or "exporting any corn, roots, &c. within "the bounds mentioned in the cuſtom, "on pain of twenty ſhillings for every "offence (except in time of danger or "urgent neceſſity, or in the caſe of *bona* "*peritura*), the forfeiture to be recovered "by action in the name of the chamber-"lain:" and four hundred porters are appointed. S. C. Stra. 462.

FAZAKERLEY, CHAMBERLAIN OF LONDON, *againſt* WILTSHIRE.

PEERE WILLIAMS, *againſt the bye-law*, argued to the following effect: * The bye-law reſtraining the number of carts in the ſtreets of *London* did not prevail without the greateſt difficulty (*a*); and the main reaſon why that bye-law was adjudged good was, that an unlimited number of carts would occaſion ſtops, and be a nuſance to paſſengers (*b*). A navigable river is, in all reſpects, like a highway; to be free to all, and none ought to be debarred from uſing it (*c*). A man cannot certainly have a more natural right to anything than to the free uſe of his bodily labour; and therefore a bye-law that ſhall reſtrain a man from the uſe of that, as this does, muſt be naught; eſpecially when no recompence is given in lieu of it (*d*). To the performance of this employment, the ſerving an apprenticeſhip is not neceſſary; for it requires not ſkill, but ſtrength. This is a bye-law that enhances the price of carriage, and encourages idleneſs. The extent of this bye-law is from *Staines Bridge* to *Kendal*, in the county of *Kent*; which is much too great. The king by his proclamation could not make ſuch a bye-law; and certainly no derivative power can be greater than the primitive. There is not ſo much as an exception in this bye-law for the owner of the goods, or his own ſervants; ſo that, according to this law, a man can neither carry his own goods, nor employ his own ſervant, &c. This bye-law is penned in obſcure and ambiguous words; it is very uncertain what act may amount to an intermeddling; perhaps the helping and aſſiſting a free porter, though at his own requeſt, may be conſtrued ſuch. From all theſe reaſons put together he concluded, that this bye-law was both unreaſonable and prejudicial to the ſubject; and therefore void. The caſes quoted by him in his argument were, *Lutwyche's Rep.* 564. *Moor*, 591. 1. *Rolle's Abr.* 304. 2. *Brownlow*, 177. *Carter*, 68. 118. *Jones*, 144. 3. *Mod.* 158.

Adjournatur (*e*).

(*a*) See Boſworth v. Hearn, 3. Stra. 1085.

(*b*) See Cuddon v. Eaſtwick, 6. Mod. 123.

(*c*) 27. Aſſize, 23. and ſee 2. Hawk. P. C. 7th edit. 152.

(*d*) 1. Roll. Abr. 559. 11. Co. 86.

(*e*) This caſe was argued again in Trinity Term, 7. *Geo.* 1. and the Court was of opinion, that both the cuſtom and the bye-law are good, inaſmuch as it was a regulation convenient to the public, and the reſtraint only from bodily labour in one inſtance. S. C. 1. Stra. 468.—See alſo Robinſon v. Webb, 1. Bar. K. B. 76. Boſworth v. Hearne, 2. Stra. 1085.

* [340].

Caſe 178.

* Banneaux *againſt* Plaſtead.

If a declaration be delivered generally as of the preceding Term, and it appear that the cauſe of action did not ariſe till after the firſt day of that Term, the record may, on motion, be explained by a ſpecial memorandum.

A DECLARATION was delivered generally as of the laſt Term; and in that declaration it appeared, that the cauſe of action did not ariſe before the middle of that Term.

Upon a verdict for the plaintiff, IT WAS MOVED *in arreſt of judgment*, that the declaration being as of the laſt Term generally muſt have relation to the firſt day of the Term; and conſequently

quently the declaration will, in point of law, be antecedent to the cauſe of action.

BANNEAUX *againſt* PLAISTEAD.

IT WAS URGED *for the plaintiff*, that by the entering of a ſpecial memorandum upon the record, *viz.* ſuch a day of the Term, which would not contradict but explain the record, this motion would fall to the ground; and that this might be done without moving the Court.

PARKER, *Chief Juſtice*, and PRATT, *Juſtice*, were of opinion, that they might enter this memorandum of courſe, and without leave; and the rather, becauſe here was no deceit as to the defendant; for he very well knew, that he was not arreſted, nor bail put in, until the middle of the Term; and conſequently that this declaration could not be as of the firſt day of the Term.

EYRE, *Juſtice*, was of opinion, that the ſpecial memorandum ought to be entered; but that the proper way was by motion.

CHESSHYRE, *Serjeant*, to end the diſpute, moved for leave; and had it (*a*).

(*a*) See 1. Sid. 432. 1. Black. Rep. 2. Stra. 1151. 1271. 1. Wilſ. 104. 171. 313. 3. Burr. 1241. 1. Stra. 582. Cowp. 456. Tidd's Practice, 191.

* The Queen *againſt* Simpſon.

Caſe 179.

THIS was a caſe that had long been depending; and the only queſtion reſerved to be ſpoken to was, Whether, upon the ſtatute of 3. & 4. *Will. & Mary*, c. 10. about deer-ſtealing, the juſtices of peace might convict the offender in his abſence, upon his default to appear, being duly ſummoned? or, Whether the juſtices ought not, by iſſuing out their warrant for apprehending the party, to have compelled him to appear?

If a defendant to an information on a penal ſtatute be duly ſummoned, and neglect to appear, the juſtice may proceed to examine the caſe, and on proof of the offence may convict the offender.

REEVES *for the latter ſide of the queſtion*. The ſtatute being ſilent in this matter, the rules of common law ought to be purſued as far as poſſibly they can. The judgment of the juſtices in this caſe is final; and there being no re-examination, natural juſtice requires that the juſtices ſhould have the party brought before them, if poſſible. The ſtatute 33. *Hen.* 8. c. 20. was the firſt ſtatute that gave leave for a man to be tried in his abſence; but this ſtatute was held to be by conſequence and implication repealed by the ſtatute 1. & 2. *Philip and Mary*, c. 10. whereby all trials are left to the courſe of the common law (*a*). The conſequence of a conviction upon this ſtatute is very penal, *viz.* for want of ſufficient diſtreſs a year's impriſonment and pillory. The ſubject-matter of this ſtatute is a treſpaſs at common law, in which caſe *a capias* lies; therefore the juſtices here ought to have iſſued out their warrant, which is their *capias*. There are no words in this ſtatute

S. C. ante, 248.
S. C. poſt. 3
S. C. 1. Seſſ. Caſ. 346.
S. C. Gilb. 282.
S. C. Stra. 46.
2. Ld. Ray. 1546. 1405.
Stra. 630.
Salk. 181.
Ante, 213.
2. Burr. 679.

(*a*) See Sir Wm. Staunford's Pleas of the Crown, 90. b.

that

THE QUEEN *againſt* SIMPSON.

that give juſtices a power to convict without appearance; if they have it by * implication, it is a greater power than is veſted in the Judges of *Weſtminſter-Hall*. By this act of parliament a corporal puniſhment is to be inflicted; and according to the rules of common law, where the judgment is to be corporal puniſhment, judgment cannot be given in the abſence of the offender. Even in attainders by parliament, execution cannot be awarded without the perſon be preſent, and aſked, whether he has anything to ſay why judgment ſhould not, &c. But the very ſtatute we are now upon plainly ſuppoſes the party ſhould be preſent; for in the fourth ſection power is given, for fear the offender after conviction ſhould eſcape, to the conſtable, other officer, or perſon proſecuting, to detain; which plainly imports his being preſent. It is obſervable, that though by the ſtatute the power of convicting is given to the juſtices of the county where the offence is committed; yet in caſe the party fly, and is apprehended in another county, then this power is devolved to the juſtices of that county where the party is taken, purely that the party may be preſent when convicted. As to the objection, that this conſtruction will render convictions difficult, becauſe a perſon may be ſummoned when he cannot be taken, the anſwer is, that if a ſummons in this caſe were ſufficient, it muſt certainly be a perſonal ſummons; and he that can be perſonally ſummoned may be taken.

FORTESCUE, *Solicitor General, contra.* By the ſtatute which we are now upon, a new judge and a new way of proceeding is eſtabliſhed. The very deſign of the ſtatute is to prevent thoſe delays that attend the forms of common law proceſs. The pro-
*[343] ceedings in this caſe, where the ſtatute is ſilent and does not interpoſe, are to be conducted by the rules of natural juſtice. * He denied the rule laid down, that in ſummary proceedings the rules of the common law are to be obſerved; eſpecially ſuch rules as would directly overturn the nature of a ſummary proceſs, and make it more prolix, &c. If this act of parliament had not intended to have pared away all the forms of common law, ſome of the proceedings by the common law would have been taken notice of by the act. It is very expreſsly ſet forth in the conviction that the party was duly ſummoned, and had notice to appear and ſhew cauſe why he ſhould not be convicted. This is all that the rules of natural juſtice require; he might have appeared if he pleaſed; and ſurely he ſhall not take advantage of his own wrong, or elſe it will be in the power of any perſon at pleaſure to avoid being convicted. As there are no words in the act of parliament that give a juſtice of peace power to convict in the abſence of the offender, ſo neither are there any words in the act that make his appearance neceſſary. If therefore the act of parliament is ſilent, and may be expounded either way, that expoſition ought certainly to prevail which will render the act moſt effectual. This is not to be conſidered as a criminal proceeding, but a civil one for a certain ſum of money.

By

By *Bagge's Caſe* (*a*), a perſon may be disfranchiſed, loſe his freehold, if when duly ſummoned he will not appear; and the conſtant practice is to proceed to disfranchiſement, in the abſence, &c. if the party, being duly ſummoned, refuſe to appear. Nay, this point was carried one ſtep higher in *Glide's Caſe* (*b*); for it is there held, that if the party live out of the town he need not be ſummoned; and the reaſon is, becauſe it was his duty to attend.

N. B. There were two convictions; and in one of them the party, before conviction, was heard by his * attorney: therefore it was obſerved by THE SOLICITOR GENERAL, that though, ſtrictly ſpeaking, according to the forms of law, the offender could not make an attorney to appear for him, yet in this caſe, where the proceſs is of a ſummary nature, and the rules of natural juſtice principally to be regarded, it is material, that any perſon was heard in his behalf; becauſe then it cannot be ſaid, that the perſon was condemned unheard. There is no caſe or authority quoted to ſhew, that the juſtice has a power to apprehend. It is true, that where an act of parliament is plain, conſequences are not to be regarded (*c*); for that would be to aſſume a legiſlative authority. But where an act of parliament is doubtful, there the conſequences are to be conſidered; and care is to be taken, that ſuch an interpretation be not put upon the act as will quite elude the force of it; and that will be the caſe here, if there can be no conviction but upon the appearance of the party. Whereas no inconvenience, no breach of any rules of natural juſtice, attends the other interpretation of the ſtatute 5. & 6. *Will. & Mary*, c. 22. about hackney-coaches, which is almoſt a parallel caſe; and the general practice of the commiſſioners there is, to convict without appearance upon a ſummons. * [344]

PARKER, *Chief Juſtice.* A court may, perhaps, in prudence not care to give judgment in the abſence of the party; but I ſee no reaſon but that it may be done, and I take it to have been done in *Mawgridge's Caſe* (*d*). Execution cannot indeed be awarded but in the preſence of the party; but that depends upon this reaſon, that there may poſſibly be a miſtake of the perſon; or ſome other reaſon may have happened, ſubſequent to the judgment, why execution ſhould not be awarded, which it is but reaſonable the party ſhould have an opportunity to inſiſt upon. * But here had the party appeared, it is taken for granted that judgment might have been given in his abſence. I am of opinion, that the ſummons muſt be perſonal; and therefore it is altogether as eaſy to take as to ſummon. The act plainly ſuppoſes, that the juſtices have a power to apprehend him; or elſe the clauſe would be a nugatory clauſe which ſuppoſes the offender may be apprehended. The expreſſion of detaining does likewiſe ſuppoſe him preſent; otherwiſe the act ſhould have run thus, "in caſe he be preſent." It is a known and general rule, that a ſtatute ought to be interpreted by the rules of * [345]

(*a*) 11. Co. 93.
(*b*) Trinity Term, 4. *Will. & Mary.*
(*c*) Hob. 97.
(*d*) 1. Kely. 119. 9. St. Tr. 61.

common

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common law: and therefore ſince this is in nature of a treſpaſs, for which *a capias* by common law lies; ſince the act plainly ſuppoſes juſtices of peace have a power to apprehend him, and that they will execute this power; and ſince it is as eaſy to apprehend as it is to ſummon, I am of opinion at preſent, that the juſtices ought to have the party before them.

PRATT, *Juſtice.* If a juſtice of peace has a power of iſſuing out his warrant for the bringing of the party before him, it muſt be given him either by the expreſs words of the ſtatute, or as a power incident to the juriſdiction which the ſtatute inveſts him with; if the latter way, I fear he muſt have the ſame power allowed him in all ſummary proceedings. If a ſummons be ſufficient, I know not why the ſame ſummons ſhould not do here as in other caſes, *viz.* the leaving it, where the party cannot be found, at the uſual place of his abode; and then a perſon may be ſummoned when he cannot be taken.

Adjournatur (*a*).

(*a*) This caſe was argued again in the Hilary Term following, and the conviction adjudged to be good. S. C. poſt. 378.

Caſe 180.

* The Caſe of the Corporation of Banbury.

Previous to 11. *Geo.* 1. c. 4. the election of a mayor muſt have been on the charter-day.

PARKER, *Chief Juſtice.* If a mayor be not choſen by the time preſcribed by the charter, and there be no proviſion in the charter for the old mayor's continuing on until a new mayor is choſen in, the corporation is diſſolved, and conſequently cannot proceed to a new election (*a*). Indeed, ſome are of opinion, that this may be cured by the iſſuing out of a writ under THE GREAT SEAL, impowering them to proceed to a new election; but others are of opinion, that even this will not do, and that there is no other remedy but to obtain a new charter from THE CROWN. But nobody ever thought, that in ſuch a caſe the *quondam* corporation could revive itſelf by chooſing a new head, without ſuch a writ under THE GREAT SEAL (*b*).

2. Mod. Caſes in Law and Equity, 129.

(*a*) But ſee now 11. *Geo.* 1. c. 4.

(*b*) See an account of this caſe from a manuſcript note of it by Lord Hardwicke, Rex *v.* Paſmore, 3. Term Rep. 221. where it is decided, that when an integral part of a corporation is gone, and the corporation has no power of reſtoring it, or of doing any corporate act, the corporation is ſo far diſſolved, that the crown may grant a new charter, 3. Term Rep. 199. 249.

Caſe 181.

Johnſon *againſt* Louth.

A *gunner* in the artillery, if arreſted, ſhall be diſcharged on common bail.

THE QUESTION was, Whether *a gunner* was within the late act of parliament, that orders thoſe liſted as ſoldiers to be diſcharged from arreſts for debt.

S. C. 1. Stra. 7.

IT WAS OBJECTED, that they were not within the act, becauſe they were warrant officers, and took a particular oath, and becauſe the

the makers of this act of parliament ſeemed apprehenſive that they would not have been liable to the ſame puniſhment, in caſe of mutiny and deſertion as other ſoldiers, unleſs they had, by an expreſs clauſe, made them ſo. It was likewiſe inſiſted, that the deſign of the act being to encourage men to enter into the king's ſervice, muſt not be extended to ſuch in the army whoſe pay was ſo conſiderable as that this alone would be a ſufficient inducement. The pay here was one ſhilling and fourpence a-day.

JOHNSON *againſt* LOUTH.

* THE COURT. As to the clauſe in the act relating to mutiny and deſertion, the act only ſuppoſes it poſſible that there might be a doubt; and therefore wiſely reſolves to make every thing clear, where the puniſhment to be inflicted is nothing leſs than death. But then the act of parliament reſolves the doubt, as we do now, that he is *a ſoldier*. The matter does not turn upon the *quantum* of the pay; if it did, *a trooper* moſt certainly would be out of the act (*a*), whoſe pay is much more conſiderable than that of *the gunner*, and who generally gives a good ſum of money for his place. The reaſons why a gunner's pay is more conſiderable than that of the ſoldier are in reſpect of their ſkill, and the hazard they run; both which conſiderations render their ſervice more neceſſary, and make it more reaſonable that they ſhould not be taken away from the ſervice.

* [347]

Accordingly he was diſcharged.

(*a*) It was adjudged in the caſe of Bayley v. Jenners, that a trooper is within the act. 1. Stra. 2.

HILARY

HILARY TERM,

The Third of George the First,

IN

The King's Bench.

Thomas *Lord* Parker, *Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir William Thompſon, *Knt. Recorder of London, Solicitor General.*

Caſe 182.

* Cole *againſt* Hawkins.

In tranſitory actions, time and place not material.
S. C. ante, 251.
S. C. Gilb. 279.
S. C. 1. Stra. 21.

ASSUMPSIT. The plaintiff declared upon a promiſe made the ſixteenth of *January* 1706.

The defendant pleaded in bar the ſtatute of Limitations; and that the cauſe of action did not accrue within ſix years before the exhibiting of the bill.

The plaintiff replied, the bill was exhibited the twenty-third of *January* 1713; and that cauſe of action did ariſe within ſix years before exhibiting the bill.

To this the defendant demurred.

PARKER, *Chief Juſtice*, now delivered the reſolution of THE COURT.

Judgment muſt be given for the plaintiff. For this being the caſe of a parol promiſe, the day in the declaration is not material; and therefore the plaintiff in his replication has only departed from an immaterial part of his declaration, which would be cured by a verdict, and is now aided, upon a general demurrer by ſtatute for amendment of the law. * Were it more than matter of form, a verdict

COLE *againſt* HAWKINS.

a verdict finding the promiſe at another day could never cure it, as moſt certainly it would. And for this purpoſe was quoted the caſe of *Lee v. Rayne* (*a*), where this learning is laid down, that for the plaintiff in his replication to vary from the time or place in his declaration, in order to follow the defendant's plea, is not a departure. In the old Books, indeed, this would have been a departure (*b*). And unleſs what ſtrictly ſpeaking is a departure be ſometimes allowed; unleſs the plaintiff, where the defendant by his juſtification makes the time or place material, may follow the defendant's plea, though it lead him to another time or place; all that doctrine, that in tranſitory actions, where time and place are not material, the plaintiff may declare at any time or place, muſt fall to the ground.

Judgment for the plaintiff (*c*).

(*a*) Lev. 110. reported likewiſe 2. Keble, 566. 578.
(*b*) 22. Aſſ. 86.
(*c*) See Stafford *v.* Forcer, ante, 311. Mathews *v.* Spicer, Stra. 806.

Caſe 183. Burgh *againſt* Blunt.

Motion for an attachment for diſobeying a tolt.

CHESSHYRE, *Serjeant*, moved for an attachment againſt the judge of the court of *Holderneſſe*, in *Yorkſhire*, for diſobeying *a tolt*, whereby the cauſe was to have been removed into the county-court, from whence, as THE SERJEANT believed, the parties deſigned by a *pone* to remove it into the court of common pleas; and though, by a *recordare*, it might have been removed at once into the court of common pleas, yet the parties might take this way, if they pleaſed.

CHESSHYRE, *Serjeant*, in behalf of his motion, urged, that diſobedience to the *tolt* was a contempt to the law of the land, over which the court of king's bench were guardians; that that court was inveſted with a general *juriſdiction over inferior courts, and was to take care, not only that they did not tranſgreſs their juriſdiction, but likewiſe that they proceeded regularly in matters confeſſedly within their juriſdiction.

* [350]

Ante, 48. 60.

EYRE, *Juſtice*. The more proper way is firſt by *mandamus* to oblige them to obey the *tolt*; and if, notwithſtanding that, they proceed, an attachment may be granted for diſobedience to the *mandamus*. I do not ſee, why we may not as well grant an attachment againſt the judge of a ſpiritual court, for proceeding after an appeal, as do what is now aſked.

PARKER, *Chief Juſtice*. There are ſeveral other remedies beſides that deſired. You may have a prohibition; or you need make no defence, and bring your writ of *falſe judgment*; and when they ſhall return that they were ſerved with the *tolt*, as they muſt, it will then appear, that all the proceedings are erroneous; for their juriſdiction failed upon the receipt of the *tolt*.

But

BURGH *againſt* BLUNT.

But CHESHYRE, *Serjeant*, preſſing his motion, and PAGE, *Serjeant*, affirming that he had the motion granted to him in the caſe of *King v. Langſton*,

THE COURT made a rule to ſhew cauſe, why *an attachment* ſhould not be granted.

The King *againſt* Theed.

Caſe 184.

THE COURT was moved to ſuperſede a writ *de excommunicato capiendo.*

A writ of *excom.* in a ſuit "*in quodam negotio pro reformatione et correctione morum*" is too general.

The objection to the writ was, that it was too general; and that it did not appear, that the cauſes for which the party was to be impriſoned by the writ *de excommunicato capiendo* were of ſpiritual conuſance; * for it was only *in quodam negotio* concerning the correction and reformation of manners.

* [351]

S. C. 1. Stra. 43.

To this it was ſaid, that the ſame ſtrictneſs is not required in writs as in libels; and further it was much inſiſted upon, that he was ſaid to be excommunicated, according to the canon; and the caſes of *The King v. Toſeland (a)*, and *The King v. Fowler (b)*, were quoted.

But THE COURT were clearly of opinion, that the writ was too general (*c*).

THEN IT WAS INSISTED UPON, that the motion for the *ſuperſedeas* was made too early, becauſe it was made before the ſheriff had returned the writ; and to this purpoſe 1. *Siderfin*, 181. was cited.

The writ of *excommunicato capiendo*, though opened by the court of king's bench, and delivered to the ſheriff to execute, may, if it appear to have been iſſued erroneouſly, or without juſt cauſe, be *ſuperſeded* before it is returned.

Salk. 294.

PARKER, *Chief Juſtice.* This is a writ which iſſues out of chancery, returnable into this court, and is delivered to the ſheriff in the preſence of the juſtices; and this whole matter is entered upon record. Now when the court of chancery has iſſued out this writ, and it is delivered to the ſheriff, the chancery, if applied to for a *ſuperſedeas*, would probably ſay, they had nothing to do with it. And then, if the court of king's bench cannot grant a *ſuperſedeas* before the return, the conſequence will be, that a ſubject may for a long interval of time, *viz.* between the delivery of the writ to the ſheriff and his return, be wrongfully deprived of his liberty, without poſſibility of redreſs. The command to the ſheriff to execute the writ is the command of the king; and the queſtion is, whether this Court ſhall let the ſheriff execute that writ, when the execution of it is intruſted to them, and an entry of record made of it, where the writ appears to the Court to have iſſued out erroneouſly. * Certainly this Court might have quaſhed it before it was delivered to the ſheriff; *à fortiori* therefore now; for it is no more than for us to correct our own miſtakes, by calling back a writ that iſſued through our overſight.

* [352]

(*a*) Term, 1. *Geo.* 1. and Reg. v. Hill, 1. Salk. 293.
(*b*) Salk. 293.
(*c*) See alſo Rex v. Gapp, Eaſter

THE KING *againſt* THEED.

EYRE, *Juſtice.* The return of the *habeas corpus* has no relation to the writ *de excommunicato capiendo*, which entirely deſtroys the authority of the caſe in *Siderfin.* I take this court to be poſſeſſed of the cauſe by the entry of the writ upon record, and delivery over to the ſheriff. The writs that go out of this court, if they iſſue erroneouſly, are frequently ſuperſeded before the return; though thoſe are writs as much out of the hand of the court as this writ.

PRATT, *Juſtice.* I take the reaſon of the proviſion, that this writ iſſuing out of chancery, and returnable into this court, muſt firſt be opened in this court, and in the preſence of the juſtices of this court be delivered to the ſheriff *exequend.* to be a proviſion in favour of the liberty of the ſubject, that a ſubject may not be deprived of his liberty by writs that iſſue of courſe out of chancery, until ſuch time as the Judges of this court ſee whether he has deſerved it or not. To ſay this writ cannot be ſuperſeded before the return, is as much as to ſay, that this Court ſhall not correct their own miſtake until the miſtake has occaſioned as much miſchief as poſſibly it can.

PARKER, *Chief Juſtice.* This writ is actually entered upon record; for the entry is *delib. fuit* in the preſence of the juſtices, to the ſheriff *exequend.* The writs that iſſue out of this court are never entered at large upon record before the return, though in ſtrictneſs they ought; but here the writ is always entered at large.
* [353] * The ſuperſeding of our own writs before the return is a ſufficient proof that writs may be ſuperſeded, though not in court. The obligation of the ſheriff to execute this writ reſults from an act of this Court; and ought therefore to be ſubject to the controul of this Court. It is a general rule, that whenever the Court is poſſeſſed of a record, they will proceed upon it. And upon this ground it is, that if the plaintiff in an appeal become nonſuit, the Court will nevertheleſs oblige the party to plead to it. In fact, theſe writs have not been ſuperſeded before their return; but I ſee no reaſon why they may not.

A *ſuperſedeas* was granted accordingly.

Caſe 185. The College of Phyſicians *againſt* Dr. Weſt.

A graduate of one of the univerſities cannot practiſe phyſic in *London*, without a licence from the College of Phyſicians.

8. Co. 117.
2. Bulſt. 185.
Palm. 486.
4. Mod. 47.
2. Brownl. 261.

THE QUESTION was, Whether a man who had taken his degree of *doctor of phyſic* in either of THE UNIVERSITIES might not practiſe in *London*, and within ſeven miles of the ſame, without a licence from the College of Phyſicians?

THE COURT was clearly of opinion, that a licence from the College was neceſſary; and that by reaſon of the charter of incorporation, confirmed by the ſtatute 14. & 15. *Hen.* 8. c. 5. penned in very ſtrong and negative words.

As to the teſtimonials granted by the univerſities, upon a perſon's taking the doctor's degree,

THE

THE COURT was of opinion, that these testimonials might have the nature of a recommendation; they might give a man a fair reputation, but conferred no right; and consequently all those statutes which have confirmed the privileges of the universities could revive or confirm * nothing but the reputation that this testimonial might give such graduates. And whereas it has been insisted, that by the last clause of this statute it is said, "That none "shall practise in the country without a licence from the president "and three elects, unless he be a graduate of one of the universi-"ties;" it was said, all the inference from that would be, that possibly two licences may be necessary where a person is not a graduate. In the case of *Dr. Levet (a)*, *Lord Chief Justice* HOLT did not think this a question worth being found specially. The College of Physicians, is, without doubt, more competent to judge of the qualifications of a physician than the universities; and there may be many good reasons for taking a particular care of those who practise physic in *London*.

THE COLLEGE OF PHYSICIANS *against* DR. WEST.

* [354]

Adjournatur (b).

(a) 1. Ld. Raym. 472.

(b) It is said by Lord Raymond to have been adjudged in this case, that a graduate-doctor of the University cannot practise physic within *London*, or seven miles round, without licence from the College of Physicians, 1. Ld. Ray. 472.

The Queen *against* Aires.

Case 186.

PARKER, *Chief Justice*, gave the resolution of the Court. —We are all of opinion, that judgment must be given for the king.

The king may bring a *scire facias* to repeal letters patent. S. C. ante, 258.

THE FIRST OBJECTION is, that a *scire facias* is not the proper remedy, the king not being concerned; but that an action upon the case should have been brought. As to this, *Sir Oliver Butler's Case (a)* is an express authority, that a *scire facias* is the proper way; and that the crown *de jure* ought to permit subjects to sue in the name of the king.

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THE SECOND OBJECTION, that there should have been an office found, may be answered by the same authority; for the objection was there taken, and it was held, * that no office is necessary, because there is no forfeiture.

The king may repeal letters patent without office found.

As to THE THIRD OBJECTION, arising from the days upon which, &c. the answer to that is, that it is matter of evidence, of which the jury are the proper judges. *Bracton (b)* shews how the law anciently stood with respect to different days and distances within which fairs and markets could or could not be held. Markets in *London* are very close upon one another; and the public good requires that it should be so, which will over-balance a private detriment.

The days and distances upon and at which fairs and markets are held, are matters of evidence for the jury.

(a) 3. Lev. 220.

(b) Bract. lib. 4. c. 46.

A *ſcire facias* to repeal a patent, ſtating that *the patent* was prejudicial to another's right, is ſufficient.

A FOURTH OBJECTION was, that it is ſaid, that *the grant* was to the prejudice; whereas it ſhould have been, that *the markets* were to the prejudice. And in favour of this objection the 11. *Hen.* 4. *pl.* 5. was quoted. In the caſe quoted the grant was conditional, *viz.* ſo far as it ſhould not be prejudicial; and therefore I doubt not, but in that caſe, if there had been a prejudice, an action upon the caſe would have lain, notwithſtanding the grant; but the caſe before us is the caſe of an abſolute grant, which is to be ſet aſide becauſe it breaks in upon another's right. The finding in the *ad quod damnum* is thus, "it would be no damage if we "grant." What would be no damage? The grant.

A *ſcire facias* does not abate by the demiſe of the crown.

S. C. 1. Stra. 43.

AS TO THE FIFTH OBJECTION, that the *ſcire facias* was diſcontinued by the death of the queen; we are all of opinion, that this is helped by the ſtatute 1. *Anne*, c. 8. penned in the ſtrongeſt terms imaginable.

JUDGMENT was given againſt the defendant.

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Caſe 187.

* Thornby *againſt* Fleetwood.

A *common recovery* ſuffered by a papiſt tenant in tail, for the purpoſe of making a marriage-ſettlement is good; for he is not "a purchaſer" within the ſtatute 1. *Jac.* 1. c. 4. ſ. 6.

S. C. ante, 113.
S. C. poſt. 406.
8. C. Comy. Rep. 207.
S. C. 1. Stra. 318.
S. C. Bro. P. C. 203.
Harg. Co. Lit. 132. *notis.*
2. Peer. Wms. 362.

JUDGMENT having been given for the defendant in the court of common pleas, a writ of error was brought in the court of king's bench.

MR. REEVES *for the plaintiff in error.* This caſe depends upon the conſtruction of three acts of parliament; all of them acts made *pro bono publico*, to prevent the growth of popery; and therefore they all ought to have a large and liberal interpretation; ſuch an interpretation as will beſt anſwer the deſign of their making.

THE FIRST QUESTION in this caſe is, Whether the ſtatute 1. *Jac.* 1. c. 4. is not repealed by 3. *Jac.* 1. c. 5. or 3. *Car.* 1. c. 2.? That it is not repealed by 3. *Jac.* 1. c. 5. is plain enough; becauſe the perſons, offences, and penalties, in theſe two acts of parliament, are different. Nor is it repealed by 3. *Car.* 1. c. 2. It is not pretended to be repealed directly, and by ſo many expreſs words; on the contrary, it is ſaid in the beginning of 3. *Car.* 1. c. 2. that the ſtatute 1. *Jac.* 1. c. 4. ſhall be in full force. Such an interpretation, if poſſible, ought to be put upon theſe two acts, as that they may both continue in force; eſpecially when the latter act takes notice of the former, as an act in force, and which ought to continue ſo. If the ſtatute 1. *Jac.* 1. c. 4. was repealed by 3. *Car.* 1. c. 2. then the offenders againſt 1. *Jac.* 1. c. 4. would be in a better condition after the ſtatute 3. *Car.* 1. c. 2. than before, which no one can imagine who reads the preamble of ſtatute 3. *Car.* 1. c. 2. But this would plainly be the caſe; their capacity

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to * purchaſe would be reſtored, &c.; the ſtatute 3. *Car.* 1. c. 2. as to perſons already beyond the ſeas, would be entirely ineffectual; for it is contrary to law, that perſons out of the land ſhould be outlawed, unleſs in ſome particular caſes eſpecially provided for.

Lord

Lord Coke (*a*) is positively of opinion, that the statute 1. *Jac.* 1. c. 4. is in force, notwithstanding the statute 3. *Jac.* 1. c. 5. and 3. *Car.* 1. c. 2.

THE SECOND QUESTION in the case is, Whether any estate will vest in the offender, notwithstanding the statute 1. *Jac.* 1. c. 4. the words whereof, as to this purpose, are: "shall in respect of "himself only, and not in respect of his heirs or posterity, be dis- "abled to inherit, purchase, take, have or enjoy, any profits, he- "reditaments, chattels, debts, legacies, &c. And that all estates, "terms, and interests whatever to be made, suffered, or done, to "the use of any such person, or upon any trust or confidence, "mediately or immediately, to or for the benefit or relief of any "such person, shall be entirely void." It is hard to imagine, that all manner of conveyances whatever should be made void; and yet the capacity of having the lands vest in him, not taken away. As for those words, "not in respect of his heirs or posterity," the meaning of that is only to enable the heir to inherit from any remote ancestor, notwithstanding this incapacity or disability of the more immediate ancestor. The interpretation contended for on the other side, is directly contrary to the words of the act. For whereas the act says, "that in respect of himself, he shall not in- "herit, &c." they say he shall, and by that means be enabled by fine, &c. to bar the heir; which, if he be protestant, will most certainly be done. This then is an interpretation flatly against the words of the act, in favour of the offender, and to the prejudice of the heir, who is by the act of parliament designed to have all the power over the estate. * *Hobart* (*b*) mentions two sorts of rights, viz. *jus acquirendi* and *jus alienandi*, so that, according to him, the right of alienating is looked upon as a right or interest. As to the objection, that if this be a right or interest, it is such a one from which no advantage can possibly accrue to the party; because upon sale the money is forfeited, it may be answered, that money may be disposed of secretly, may be sent beyond sea, and the forfeiture impossible to be come at. Besides, the power of disposing of the estate is a very considerable privilege, though he were not to get any money by it. To the objection framed from those words, "and not in respect, &c." besides what has been said before, they prevent corruption of blood, and make the punishment personal only. To the objection, that by interpretation of law, the crown is to have the profits during non-conformity, it may be answered, that the rule laid down by them must be admitted for law; *viz.* that in penal statutes, when the act is silent to whom the penalty is forfeited, the crown shall have it. And so it must have been here, had the words of the act been, "shall forfeit;" and not said to whom. But this is not the case; for here the act creates an incapacity in the offender to *take*; and if he cannot take, most certainly he cannot *forfeit* (*c*). If the king is to have the profits only, and not the estate, then the king has directly the same interest as he

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(*a*) 3. Inst. 178. (*b*) Hob. 336. (*c*) Co. Lit. 13. a.

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has upon outlawry in perſonal actions; which is a very precarious intereſt; for according to 21. *Hen.* 7. *pl.* 7. *a.* this pernancy of the profits may be determined by the alienation of the perſon outlawed. It muſt be owned, that this caſe is not altogether law; for it
* [359] is reſolved (*a*), * that after inquiſition found, the perſon outlawed cannot alien; and ſo is the caſe of *Britton v. Cole* (*b*). But ſtill at any time before inquiſition found, the intereſt of the king may be defeated by the alienation of the perſon outlawed.

The act being ſilent as to the perſon who ſhall take, it muſt be interpreted according to the rules of common law. And here it may be proper to conſider the nature of diſabilities at common law, which are of three ſorts: Firſt, *Propter delictum*, as in caſe of attainder for treaſon or felony. Secondly, *Propter defectum ſubjectionis*, as in the caſe of an alien. Thirdly, *Cauſâ profeſſionis*, as in the caſe of a monk.

In the firſt caſe, *viz.* attainder for treaſon, the eſtate is forfeited to the king, and the blood is corrupted. A capacity is indeed left in the party to purchaſe for the advantage of the crown; but a perſon thus attainted can purchaſe nothing for his own benefit; neither can he take by deſcent. The law is the ſame in an attainder of felony; ſave that the lands are forfeited to the lords of whom they are held. Now the diſability in this act of parliament differs from the former in theſe reſpects: Firſt, It is temporary during the non-conformity. Secondly, It is a perſonal diſability only; for it does not corrupt the blood. Thirdly, The party is intirely diſabled and incapacitated to purchaſe.

The ſecond ſort of diſability at common law, is that *propter defectum ſubjectionis*, as an alien. And ſuch a one has no inheritable blood in him; he cannot be heir to anybody; nor can anybody be
* [360] heir to him. Indeed it is reſolved, in the caſe of *Collingwood** *v. Pace*, reported at large 1. *Ventris*, that this ſhall not hinder any collateral relation from inheriting. An alien may purchaſe for the advantage of the crown. This diſability comes nearer to the diſability created by this act; but yet differs from it: For firſt, the iſſue is not diſabled by the ſtatute; and ſecondly, the party is made entirely incapable of purchaſing.

The third ſort of diſability by common law, is that of a monk; and this diſability ſeems in every reſpect to agree with the diſability created by this act. A monk cannot purchaſe; no more can the offender againſt this ſtatute. The heir of a monk is not diſabled from claiming by him; ſo it is here. The monk when deraigned is to be reſtored; ſo is the offender here when he conforms. When the law ſays that a monk is *civiliter mortuus*, this is to be eſteemed only a ſimilitudinary expreſſion, and what is uſed concerning other perſons, as one that had abjured the realm; for a monk, with reſpect

(*a*) Ray. 17. Hardres, 101. (*b*) 9. *Will.* 3. Salk. 395.

to all the advantages of the church, is as much alive as any other perſon whatſoever (*a*). THORNBY *ag.* FLEETWOOD.

That interpretation therefore ought to prevail, where the act is ſilent, as will beſt ſquare with the rules of law, in like caſes. Thus in 3. *Co.* 85. *b.* we find the ſtatute *De Donis* expounded, in ſeveral inſtances, by the rules of common law. This ſtatute will be made effectual, if interpreted by the rules of law in caſe of a monkiſh diſability. And this likewiſe will anſwer the grand objection, What becomes of the eſtate during the life of *Philip?* A man has iſſue two ſons, the eldeſt brother goes beyond ſea, the father dies, the ſecond ſon, in a writ of *Mortdaunceſtor*, recovers the eſtate (*b*), for it ſeems the being beyond ſea, was then looked upon as an incapacity; and yet there held, that upon the return of the elder brother, the * land ſhould be diveſted out of the younger brother, and reveſt in the elder. *Philip* incurred the diſability of being an alien before the deſcent; and becauſe the law will not caſt a deſcent upon a perſon diſabled by attainder or otherwiſe, therefore the dutcheſs does not put up her claim under any of the diſabled perſons, but as a reverſioner (*c*). * [361]

But to return to the grand objection, *viz.* If the eſtate in fee ſhould go to him in remainder, or eſcheat, what is to be done in caſe *Philip* have iſſue, or conform himſelf? To this it may be anſwered, FIRST, That there are not in the act any words of reſtitution with reſpect to the offender himſelf. Indeed after conformity he is to be diſcharged from his incapacity; but nothing appears in the act, whereby he is to be reſtored to what he has loſt during his non-conformity. In this reſpect, it may be compared to the effects of denization, with reſpect to deſcents to and from aliens (*d*). But if it ſhould happen by accident, that ſome of the poſterity ſhould be hurt; yet is not this a ſufficient objection? It is a received maxim of law, that a freehold can never be in ſuſpence or abeyance, ſave in caſes of abſolute neceſſity (*e*). If then the freehold muſt be in ſomebody, where muſt this freehold be but in the reverſioner? In *Plowden (f)* there is an inſtance of the dodging of a freehold; and though this caſe is in part denied to be law, in 3. *Co.* 10. *b.* yet there it appears, the freehold muſt veſt in the king to prevent abeyance. But the iſſue of *Philip* may be let in according to the rules of law. In the Year-Book 49. *Edw.* 3. 16. there is this caſe: If a tenant of the king deviſe that his executors ſhall ſell his land, and die without heir; the land ſhall veſt in the * king; and if the executor afterward ſell the land, it ſhall reveſt. To this purpoſe is the caſe before cited, where, upon the return of the elder brother, the land ſhall reveſt in him. Another caſe is there put: A diſſeiſor dies without heir, the land eſcheats, yet the diſſeiſee may bring his action for the land againſt the lord; which is a ſtronger caſe * [362]

(*a*) Co. Lit. 132.
(*b*) Fitz. Abr. "Mortdaunceſtor" 47. 55.
(*c*) 1. Vent. 417.
(*d*) 1. Vent. 419.
(*e*) Co. Lit 342.
(*f*) Plowd. 48.

THORNEY *againſt* FLEETWOOD.

than that before us; for it is not juſt that the iſſue in tail ſhould ſuffer for the act of the tenant in tail. *Lord Coke (a)* delivers it as his clear opinion, that if a man make a feoffment in fee, to the uſe of himſelf and his wife in tail, then to the uſe of the huſband in fee, and has iſſue a daughter and dies, leaving his wife privily with child of a ſon, by which means the reverſion in fee deſcends to the daughter, and the wife, before the birth of the ſon, levies a fine, or ſuffers a common recovery, whether in this caſe, the daughter enters, or does not enter, whether ſhe joined in the fine, was vouched in the common recovery, or did any other act to diſable herſelf, yet that the ſon born afterwards ſhall have the eſtate-tail; for it is not reaſonable that any act of the daughter ſhall prejudice the ſon *in utero matris*. Though before a late act of parliament, it was cuſtomary to veſt an eſtate in truſtees, for the preſervation of contingent remainders; becauſe by a principle of law, a remainder muſt veſt, either during, or at leaſt when the particular eſtate determines; yet it has never been thought neceſſary in caſe of a remainder actually veſted, even before the late ſtatute, to veſt the eſtate in truſtees, for the preſervation of the inheritance to after-born children. The dutcheſs might in a *formedon* deduce her pedigree from the donor, taking no notice of the donees, according to 8. *Co.* 88.

*[363] * CHESHYRE, *Serjeant*, argued *for the defendant*, that the eſtate muſt neceſſarily veſt in the offender, to anſwer the *proviſo* in caſe of conformity; for if the eſtate do not veſt, the encouragement to conformity will be taken away; there being no poſſibility according to the rules of law, for the heir to take, but through the anceſtor. He doubted whether the anſwer to this objection would hold, *viz.* that the iſſue ſhould for his benefit be allowed to ſay, that the anceſtor did take, when every-body elſe muſt ſay, that he did not take. He obſerved, that the ſaving to the poſterity, was inſerted in the very body of the act, and did not come in by way of *proviſo*; which ſhews it to have been firſt in the thoughts of the law-makers; that it was enough for the defendant, if the eſtate muſt veſt in the anceſtor for the benefit of the iſſue; and likewiſe, that the title of the defendant did not neceſſarily depend upon the validity of the common recovery; becauſe *Philip* was alive, and either had iſſue, or (which was all one in intendment of law) was capable of having iſſue.

Then he proceeded to ſhew, that that interpretation of the act, whereby the eſtate was adjudged to veſt in the offender, was FIRST, more ſafe; SECONDLY, more conſonant to the rules of law; and THIRDLY, would more effectually promote the deſign of the act.

FIRST, More ſafe; becauſe if the anceſtor do not take, the act is altogether ſilent who ſhall. Beſides, as the legiſlators did not intend to reſtrain the offender abſolutely from purchaſing; for,

(a) 3. Co. 61. b.

in

in his opinion, he might purchaſe for his heirs to enjoy after him, but not to retain; ſo by a parity of reaſon, the law-makers did not intend to reſtrain him from taking by deſcent, for * the benefit of his iſſue, but only from taking to retain for his own benefit. He urged, that their interpretation created a difference never thought of by the law-makers, as to the time when the deſcent happens, *viz.* if it happen before the conformity of the offender, then with reſpect to that eſtate, his conformity (according to them) ſhall not at all avail him; but if it happen after conformity, then he ſhall take. The act of parliament would moſt certainly have provided for the reverſioner, if they deſigned it ſhould go over to him. As to what was ſaid concerning the regard the law paid to the certainty of a freehold, and that it ſhould not be in abeyance, ſave in caſes of abſolute neceſſity, he allowed that to be law, but thought it made entirely for him; becauſe unleſs the eſtate did veſt in the anceſtor, there could be no tenant to the *præcipe*. He obſerved, that this came to be a queſtion after the death of the offender, who, during his life, had always been eſteemed to have a good title, and forty years after the offence committed; that a writ of *dower* had been brought againſt the anceſtor, and judgment againſt him in that action; and this judgment confirmed in parliament, which could not have been, unleſs he had been a good tenant to the *præcipe*. That unleſs this interpretation prevailed, and the eſtate allowed to veſt in the offender, many marriage-ſettlements and purchaſes would be overturned; and multitudes of leſſees, all claiming under this offender, muſt unavoidably be ruined. Upon theſe accounts, he concluded his conſtruction of the ſtatute to be the moſt ſafe.

* [364]

SECONDLY, He argued, that this conſtruction was moſt conſonant to the rules of common law, where no particular direction is given how the eſtate ſhall go; for there the law always throws it upon the king. * And where can this power be lodged ſafer than in the crown? Who ſo zealous and able to put the law in execution? *Tutiſſima eſt cuſtodia quæ ſibi creditur.* Thus in outlawries, attainders for treaſon or felony, the offender may take for the benefit of the crown.

* [365]

THIRDLY, This interpretation will more effectually promote the end and deſign of the law. This is not, as is pretended by the other ſide, a lowering of the penalty. The profits of the land is both in law and reaſon the land itſelf (*a*). And he who is excluded from taking the profits, is excluded from the land, as to all purpoſes of profit and advantage for himſelf. According to the interpretation they would put upon the act, it may ſo happen, that a *Roman* Catholick, only through the misfortune of a foreign education, may be excluded, to make way for a rigid papiſt bred at home.

(*a*) Co. Lit. 4.

Then

THORNEY *againſt* FLETWOOD.

Then he argued, that this offence being pardoned by the ſtatute 2. *Will. & Mary*, c. 10. *A. D.* 1690, the diſability was ſo *ex conſequenti*; and that this pardon coming out before the time of the deſcent, was equivalent to a conformity (*a*). But it may be objected, that this is a fact not found in the ſpecial verdict. To which he anſwered, that this act being a general law, the Court muſt *ex officio* take notice of it. And had the offender not been included in the act, it would have been incumbent upon the other ſide to ſhew that he was excepted out of the pardon (*b*).

Then he argued from a clauſe in the 2. *Will. & Mary*, wherein it is expreſsly provided, that that act of parliament ſhould be taken notice of in evidence, without pleading, that by a parity of reaſon, the Court ought to take notice of it, though not found by verdict.

* [366] * Then by a nice and minute obſervation of the difference between the two acts of 1. *Jac.* 1. c. 4. and 1. *Car.* 1. c. 2. he ſhewed, that though the former was not repealed by the latter, yet it was ſtrengthened, enlarged, and explained by it.

Then he inſiſted, that as the eſtate-tail ſubſiſted unſpent, it could not go over to him in reverſion. *Philip*, in judgment and conſideration of law, may have iſſue as long as he lives. Nay, he further inſiſted, that he might have iſſue at the time of the deſcent: Nay, that it muſt be ſuppoſed, that he has iſſue now alive; that had the caſe been otherwiſe, the contrary ſhould have appeared in the ſpecial verdict. Notwithſtanding the endeavours of the Counſel of the other ſide, he ſaid it ſtill remained a doubt, in caſe the eſtate is to go over to the reverſioner, by what rules of law the eſtate can be brought back again, for the ſake of the offender (in caſe of conformity), or for the iſſue. The caſe of *Fitzherbert* (*c*) is a hard caſe, and not law now. As to the caſe put of a diſſeiſor dying without heir, that caſe proves no more, than that as long as the tortious eſtate did ſubſiſt, ſo long (and longer in the nature of the thing were impoſſible) the lord had a right. But no caſe has yet been cited, where the entry of him in remainder or reverſion had been held lawful, the eſtate tail ſubſiſting and remaining unſpent. The veſting and reveſting of eſtates, is a thing not at all favoured in law. He acknowledged, that in 1. *Co. Rep.* 87. it is held, that a grant of a rent *de novo*, to ceaſe during the minority of the heir of the grantee, was good, and would ceaſe accordingly.

Ante, 360.

Ante, 361.

* [367] * But to this he anſwered, Firſt, That this does not hold in the caſe of a grant of rent *in eſſe*. Secondly, That the eſtate in the rent itſelf did not ceaſe; but the eſtate was only exonerated in point of render, and not of veſting. In 23. *Edw.* 3. 19. (the ſame caſe with that juſt mentioned in *Co. Rep.*) it appears, that the wife of the grantee did recover the rent in a writ of dower, with a *ceſſet*

(*a*) 3. Lev. 331, 332.
(*b*) 3. Lev. 20. 88.
(*c*) Fitz. Abr. "Mordaunceſtor" 47.

executio

executio, during the minority of the heir; and that judgment was affirmed in parliament, which could not have been if it had ceaſed intirely. If a tenant in tail be attainted of treaſon, it works no corruption of blood (*a*), becauſe that would have produced a ceſſer of the eſtate-tail, by which means the eſtate would have been taken from the king, and gone to him in the reverſion, which the act did not intend. This reaſon will hold here, for the heir cannot take by deſcent, where the anceſtor did not take; for the anceſtor is the root from whence the inheritance muſt be derived. That the donee "died without iſſue of his body," are neceſſary words in all *formedons*; which is a plain proof, that a *formedon* will not lie, but upon the death of the donee without iſſue. If a monk had iſſue at the time of his profeſſion, he in the remainder cannot bring a *formedon*. If the dutcheſs had brought her *formedon*, the life of *Philip* had been an unanſwerable objection.

Adjournatur (*b*).

(*a*) Hob. 346. (*b*) See S. C. Note (*a*) ante, 125.

Cook *againſt* The Dutcheſs of Hamilton.

Caſe 188.

In what caſe a variance between a writ of error and the record returned is immaterial.

THIS was A WRIT OF ERROR upon a judgment in the court of common pleas; and the Court being about to give their opinion for the affirmance of the judgment,

THE COUNSEL *for the plaintiff* * *in error* moved, that the record was not removed; there being a plain variance between the record deſcribed by the writ of error, and the record returned by the court of common pleas.

* [368]

The caſe, as to this point, ſtood thus:

The writ of error run thus, "*quia in recordo et proceſſu acetiam in redditione judicii loquelæ quæ fuit in cur. noſtra coram vobis et ſociis veſtris juſtic. noſtris de banco per breve noſtrum inter J. S.*" and thirty-one defendants there named, *error intervenit*, *&c.* and by the record returned it appeared, that the original action was between *J. S.* and the thirty-one defendants before named, and one defendant more; and that the verdict was likewiſe had againſt the thirty-two defendants; but that the thirty-ſecond defendant died before judgment, and that notice was taken by an entry upon the record of his death; and the judgment was given only againſt the thirty-one named in the writ of error.

FIRST, This was urged to be a variance between the writ in the record deſcribed by the writ of error, and the writ in the record returned.

SECONDLY, It was inſiſted, that the offence or treſpaſs mentioned in the writ of error, which was a treſpaſs by thirty-one defendants, muſt be a different treſpaſs from that in the record returned, which was a treſpaſs by thirty-two defendants.

PARKER,

Book *againſt* The Duchess of Hamilton.

PARKER, *Chief Juſtice*, delivered the reſolution of the Court to the following effect: We are all of opinion, that this writ of error is well brought, and the record well removed, notwithſtanding both theſe objections.

THE FIRST OBJECTION is capable of three anſwers: FIRST, That the word "*inter*" does not refer to "*breve*," but "*loquelæ*." It is true it may refer to either; ſo that the Court will, ſince the rules of language will admit of it, refer it to that, which will uphold the writ of error. If there be a *comma* put between "*per* "*breve noſtrum*," * and the word "*inter*," then the word "*inter*" will plainly refer not to "*breve*" but "*loquelæ*." The word "*breve*" is only uſed to ſhew what way the ſuit was commenced, by writ or bill. If the writ of error had been "*ſine brevi*," then it had been impoſſible, from the nature of the thing, that the word "*inter*" could refer to "*breve*."—SECONDLY, Suppoſing the Chief Juſtice of the court of common pleas may be made *by writ*, as well as the Chief Juſtice of the king's bench, then the words "*per breve*" may refer to the Chief Juſtice.—THIRDLY, When any one of the defendants dies, it is no longer a writ againſt him; and then the caſe is all the ſame, as if he had never been named in the writ. To this purpoſe was quoted the caſe of *Oliver v. Hunning (a)*, where it was reſolved, that an original writ was determined by outlawry; *à fortiori* it will be ſo in the preſent caſe by death. To the ſecond objection we anſwer, that the identity of the treſpaſs does not depend upon the number of the perſons that committed it; for the treſpaſs may be the ſame, be it committed by five or ten perſons. And to this purpoſe the caſe of *Hunt v. Rawſon (b)* was relied upon, as being a caſe full in point. A court of juſtice ought to endeavour to expound things ſo, that they may be brought to ſome end.

* [369]

The judgment given in the court of common pleas was affirmed.

(*a*) Trinity Term, 13. *Will.* 3. (*b*) Trinity Term, 10. *Will.* 3.

* [370]

Caſe 189.

Woodright *againſt* Wright.

On a deviſe to *A.* in tail, remainder to *B.* and the iſſue of her body lawfully begotten; remainder to the right heirs of *A.* for ever. If *A.* die without iſſue, living the teſtator; and *B.* the heir at law to the teſtator, and not *C.* ſhall have the land.—S. C. 2. Eq. Abr. 666. S. C. 1. Stra. 25. S. C. 1. Peer Wms. 397.

UPON a ſpecial verdict found by the jury, the caſe was ſhortly this:

The teſtator deviſed the land in queſtion to *Edward Baſil* in tail; remainder to *Suſannah Wright*, and the iſſue of her body lawfully * begotten; remainder to the right heirs of *Edward Baſil* for ever. *Edward Baſil* died without iſſue, in the life-time of the teſtator. *Suſannah Wright*, ſome years after the making of the will, had iſſue *Margaret Wright*, the defendant, who is found

likewiſe

likewiſe to be heir at law to *Edward Baſil*; and then *Suſannah Wright* died in the life-time of the teſtator. The plaintiff's title was as heir at law to the teſtator.

The queſtion therefore was, Whether *Margaret Wright* could claim any eſtate under this will, either as heir at law to *Edward Baſil*, or as daughter to *Suſannah Wright*?

The arguments from the bar in this caſe I did not hear; but the reſolution of the Court was by PARKER, *Chief Juſtice*, delivered to the following ſubſtance:

THE FIRST POINT to be conſidered is, Whether *Margaret Wright* is entitled to take by the will, as heir at law to *Edward Baſil*, by virtue of theſe words, "the remainder to the right heirs "of *Edward Baſil* for ever?" And here the queſtion is ſingly this, Whether theſe words do make the heirs of *Edward Baſil* deviſees, and import any deviſe to them? ſo that the deviſe is not a lapſed legacy, by the death of *Edward Baſil*, in the life-time of the teſtator; or, whether *Edward Baſil* is not ſole deviſee, and thoſe words only uſed to denote and deſcribe the nature and the quality of that eſtate, which was hereby deſigned to be ſolely given to *Edward Baſil*, VIZ. to ſpeak in the language and *idiom* of law, whether theſe words are words of *purchaſe* or *limitation*? The caſe of *Bret v. Rigden (a)* muſt be moſt certainly, and was on all hands, allowed to be law. * The ſecond point only in that caſe, is applicable to this; and that was ſhortly thus. The land was given to *Henry Bret* and his heirs; *Henry* died in the life-time of the teſtator; and the queſtion was, Whether the ſon and heir of *Henry Bret* ſhould take the land by this deviſe?—MANHOOD, who argued for the ſon and heir of *Henry*, urged moſt of thoſe arguments that have been now made uſe of from the bar, in favour of the defendant; he inſiſted that the heir was included in the deviſe; and though perhaps the teſtator deſigned that he ſhould take *mediante patre*, VIZ. by deſcent, yet this is but a circumſtance relating to the manner of his taking: and therefore, ſince by the act of God, it is impoſſible that this circumſtance can be complied with, and neceſſary that the heir, if he take at all, muſt take immediately, that is certainly the better and more preferable conſtruction in caſe of a will, which ſupports the main end and deſign the teſtator chiefly aimed at, though it cannot the form and manner the teſtator deſigned that end ſhould be brought about by; rather than that which overturns the ſubſtantial, as well as the circumſtantial part of the teſtator's intention. And theſe caſes were put: If land be deviſed to *A.* for life, remainder to *B.* in tail, and *A.* dies in the life-time of the deviſor, *B.* ſhall take by the will an eſtate-tail in poſſeſſion.—If land be deviſed to the wife of *J. S.* and *J. S.* dies, and ſhe marries *J. D.* and then the deviſor dies; ſhe ſhall have the land. And yet the teſtator deſigned in the firſt caſe, that *B.*

(a) Plowden.

ſhould

WOODRIGHT *against* WRIGHT.

ſhould take an eſtate-tail in reverſion; and in the ſecond, that the wife of *J. S.* ſhould have the land; but this being impoſſible, it was reſolved, that *B.* ſhould take an eſtate tail in poſſeſſion; and that the wife of *J. D.* ſhould have the land, in order to preſerve the ſubſtance of the will when it was impoſſible to obſerve the formality; but for all this it was reſolved, that the heir of *Henry Bret* could not take. For as in all grants there muſt be a grantor and a grantee, at the time when the * grant is to take effect, ſo by parity of reaſon, in the caſe of a will, there muſt be in being a deviſee at the time of the death of the teſtator; that being the time, when by law a will is to take effect. And as to what was ſaid, that heirs were named in the deviſe; it was reſolved, that thoſe words "his "heirs," were inſerted only to limit and ſet out what ſort of eſtate the deviſor intended *Henry* ſhould take by the will, *viz.* a fee ſimple; and that conſequently thoſe words were put in as well to enable *Henry* to give away the land from his iſſue, as to let it deſcend to his iſſue. That the deſcent to the iſſue, was but a conſequence in law, of a fee-ſimple firſt veſted in *Henry*; and what lay entirely in the breaſt of *Henry*, whether he would permit it to be ſo, or not. That it was not a good way of reaſoning, that becauſe the land would have deſcended to the heir of *Henry* if it had veſted in the father firſt, therefore the heir ſhall take immediately, though the father died in the life-time of the deviſor; for then by a parity of reaſon, if *Henry* had died in the life-time of the deviſor without heirs, the lord would have had the land by eſcheat, and the wife of *Henry* muſt be intitled to dower. This caſe then being undoubtedly law, and ſo allowed to be on all hands; the next thing to be done, is to ſee, whether the preſent caſe can be diſtinguiſhed from it. The difference aſſigned is this, that the deviſe is not here as in *Plowden*, a deviſe to *Edward Baſil* and his heirs; but a deviſe to *Edward Baſil* in tail, remainder to *Suſannah Wright* and the iſſue of her body lawfully begotten, remainder to the right heirs of *Edward Baſil* for ever. So that between the deviſe to *Edward Baſil* in tail, and the deviſe to the right heirs of *Edward Baſil* for ever, there intervenes an intire eſtate, *viz.* that to *Suſannah Wright*, &c. * But to this I anſwer, that this difference produces no other effect, than a diminiſhing or leſſening of the eſtate in fee-ſimple in point of value, that is by theſe words of the will to be conveyed to *Edward Baſil*, by carving an eſtate-tail out of it. So that the only difference on this account, between the caſe in *Plowden* and the preſent caſe, is this, that in *Plowden*, *Henry Bret* was to have taken a fee-ſimple in poſſeſſion; here *Edward Baſil* was to take a fee-ſimple in reverſion. In *Co. Litt.* 319. it is held, that if an eſtate be limited to the anceſtor for term of life, remainder to *B.* in tail, remainder to the right heirs of the anceſtor, the words "right heirs" are words of *limitation*, and not of *purchaſe*; as well as if the eſtate had been limited immediately to the anceſtor and his right heirs, without the intervening of the eſtate-tail in remainder. This is the very ſame caſe with that before us; except that the caſe of *Littleton* is the caſe of a grant;

* [372]

* [373]

a grant, and this before us is the caſe of a will, which as to this point makes no difference at all. If *Edward Baſil* had ſurvived, nobody can ſay, but that the fee would have veſted in him, and in him alone; he would then have had the entire power over the eſtate, and the deſcent to his heir would then have appeared plainly to have been but a conſequence of the fee veſted in him, and which at his pleaſure he might permit or prevent. It is not his living to take the freehold, that does as it were accidentally turn theſe words into words of limitation; but becauſe theſe are in their own nature, and in all events, words of limitation, therefore it becomes neceſſary that the anceſtor muſt take, or nobody. So that upon the whole theſe words, though they may, perhaps, carry ſomething in their ſound, that looks like a deſign and intention in the teſtator of favour towards the heirs, in reality are not ſo, but ſerve only * to deſcribe the eſtate which paſſes to the deviſee, and for his benefit only: and then it comes out to be the ſame point intirely with that reſolved in the caſe of *Bret v. Rigden.* * [374]

It being clear then, that the defendant can take nothing by this deviſe, as heir at law to *Edward Baſil*; the next point to be conſidered is, Whether ſhe can take anything as daughter to *Suſannah Wright*, by virtue of that clauſe in the will, "remainder to "*Suſannah Wright* and the iſſue of her body lawfully begotten?"

In ſpeaking to this point, it will be neceſſary to ſee, Firſt, Whether ſhe can have any right, ſuppoſing the words "iſſue of her "body" be looked upon as a ſynonymous expreſſion to the "heirs "of her body?"

And ſecondly, Whether, ſuppoſing ſhe has no right this way, ſhe can derive any right, by any other interpretation which the word "iſſue" is capable of?

As to the firſt, the caſe differs not from that of *Bret v. Rigden*; ſaving that there a fee is deviſed, and here an eſtate-tail, which will make no difference in the interpretation before us; for if here the words "heirs of her body" are not words of purchaſe but limitation, the point comes out juſt the ſame. For ſuppoſing *Suſannah Wright* had lived, ſhe and ſhe only would have taken by this deviſe; and ſhe would have had a power of barring the iſſue by fine. (I ſpeak not now of common recoveries; becauſe though there the iſſue is barred, yet in conſideration of law, he is recompenſed by a judgment to recover over.) And here again, by the ſame reaſon that the daughter of *Suſannah* ſhould take, the huſband muſt be tenant by the courteſy, which they for the defendant will not ſay is law. In ſhort, the only difference that there is between a deviſe in fee, and in tail, is this, that in the former caſe the deviſee has a greater choice and variety of ways, whereby he may defeat the iſſue, than in the latter. But the words "to the heirs of the body" are as much words of limitation, and as * proper to expreſs an eſtate-tail, as the word "heirs" is to expreſs a fee. And the words in both, do not really import any deſign of favour to the heirs, but the de- * [375]

viſee

Wobdrient against Wright.

viſee only; and ſo much the rather in the caſe of an eſtate-tail; becauſe it is a known and a common method, where the teſtator or grantor has a concern or regard for the iſſue, to make the anceſtor tenant for life only, and by that means tie up the hands of the anceſtor from doing anything to the prejudice of his iſſue. It cannot be denied to have been the principal deſign of the makers of the ſtatute *De Donis*, to ſecure the eſtate to the iſſue, and reſtrain the anceſtor from conveying the eſtate from the iſſue; and therefore admitting, but not granting, that this deviſe, in thoſe times, when that ſtatute reigned in full force, would have imported a deviſe as much to the iſſue as anceſtor, ſince the one was as certain to take by the deviſe, in due time, as the other; yet would it not be ſo now, after that ſtatute is ſo much altered by ſubſequent ſtatutes, or judgments of courts of law, whereby the anceſtor has it now in his power by fine, &c. I ſpeak not of common recoveries, for the reaſon before given; for to ſhake the law, when firmly eſtabliſhed, is not to be done, without the greateſt danger to the eſtates and properties of the ſubject; and I muſt have thought myſelf obliged to have ſummitted to the number and weight of authorities, though I had not been ſatisfied with the reaſons upon which they were eſtabliſhed. The doctrine eſtabliſhed in the caſe of *Bret v. Rigden*, remained uncontroverted until *Hartop's Caſe (a)*, when it received a new ſanction. So likewiſe it was again eſtabliſhed in the caſe of *Fuller v. Fuller*, reported *Moore*, 353. and 3. *Cro.* 422.; and though it is ſaid, that two Judges differed in their opinions, yet upon a narrower inſpection it appears, that thoſe very Judges that diſſented, have, by the reaſons they gave for their diſſent, confirmed the * law now in queſtion; for they were of opinion, that the deviſees might take as purchaſers, not by the firſt deviſe, but by virtue of the new publication, which, in their opinion, amounted to a new will.

* [376]

And now I come to conſider, SECONDLY, Whether the defendant can put any other conſtruction upon the word "iſſue," by virtue of which ſhe may claim under this deviſe. In the caſe of *King v. Melling (b)* the word "iſſue," is by *Lord Hale* affirmed to be *nomen collectivum*, and takes in the whole generation; and is therefore a great deal ſtronger than the word "children." It is there obſerved, that in all acts of parliament, the word "iſſue" is as comprehenſive as "heirs of the body;" as in the ſtatute *De Donis*, and the ſtatute 34. *Hen.* 8. c. 20. of entails ſettled by the crown. *Tyler's Caſe (c)* may ſerve to ſhew the difference between the words "iſſue" and "children." *Tyler* had iſſue *A. B. C.* and *D.* and deviſed to his wife for life, after her death to *B.* his ſon in tail, and if he die without iſſue, then to his own children; *A.* had iſſue a ſon and died, and *B.* died without iſſue; and it was reſolved, that the ſon of *A.* ſhould not take as one of the children of the teſtator. Yet in *Wild's Caſe (d)* it is admitted, that if the deviſe

(a) 33. *Eliz.* Cro. Eliz. 344.
(b) 1. Vent. 229.
(c) 34. *Eliz.* in *B. R.*
(d) 6. Co. 17.

had

had been "to the children of the bodies," it would have been an estate-tail; *à fortiori*, if it had been, as in our case, "to the issue of "their bodies lawfully begotten;" because "issue" is, *ex vi termini*, *nomen collectivum*, which "children" singly is not, though by other additional words it may become so. The case itself, in *Wild's Case*, was only this: that if a devise be made to a man, and after his death to his children, or his issue, and he has issue at the time of his death, the issue shall take by way of remainder. Upon the whole it appears, that these words are words of limitation, and do most certainly, in a * will, give an estate-tail; and then the point comes out just the same. If the devisor had died just after the making of the will, it is plain, that *Susannah* would have taken an estate-tail. If it be objected, that the estate-tail results from an operation of law; that the testator designed first an estate to the devisee, then an estate to the heir; and that it is the law that conjoins them, and creates an estate-tail out of both; I answer, that the law creates an estate-tail, purely to uphold and preserve the intention of the testator, which would be often destroyed and defeated, if the children of the devisee that were in being, either at the time when the will was made, or at the time when the will takes place, *viz.* the death of the testator, were to be considered as so many distinct devisees. For example, suppose an estate devised to *B.* and the issue of his body lawfully begotten, remainder to *C.* &c. if *B.* has issue at the time of the death of the testator, *J. N.* and after the death of the testator has issue *J. S.*; according to this notion, if *J. N.* die without issue, the estate will go to the remainder-man, and not to *J. S.* which was most certainly the intention of the testator. And other cases might be put of the same nature; so that taking by limitation, and taking by purchase, is not a mere notion and way of thinking; but will in reality often let in other persons to take than what the testator designed, and in effect amounts to the making a new will. The supposition of kindness in the testator for the issue, is too precarious and slender a foundation to build upon; and generally speaking, the devisee is the only person, out of kindness to whom the devise was made; especially it seems to have been so here, where the issue was born several years after the making the will, and consequently could not be thought upon by the devisor. * The beginning of the will, whereby *Edward Basil* is, by general words, constituted heir of all (though how he was so is explained by the subsequent clauses of the will), pleads strongly that the devise was not out of pure kindness to the issue. The danger of this construction is none; for, upon supposition that the devisor intends a favour to the issue, he has it still in his power, during his life, to alter his will accordingly: so that the only consequence of this construction is, that it will oblige men, upon the death of their devisees, to do what is certainly prudent and proper to do, *viz.* reconsider their wills.

Wood rich against Wright.

* [377]

* [378]

Judgment was given for the plaintiff (*a*).

(*a*) See Hutton *v.* Simpson, Prec. Chan. 439. 2. Vern. 722. Elliot *v.* Davenport, 1. Peer Wms. 84. Hodgson *v.* Ambrose, Dougl. 330. White *v.* White, 1. Bro. C. C. 219. *mitis.* Jones *v.* Morgan, 1. Bro. C. C. 206. Doe *v.* Kett, 4. Term Rep. 601.

Case 190.

The Queen *againſt* Simpſon.

Juſtices of peace may convict an offender in his abſence, upon his default to appear, after being duly ſummoned.
S. C. ante, 248. 341.
S. C. 1. Seſſ. Caſes, 346.
S. C. Gilb. 282.

SEVERAL CONVICTIONS before juſtices of the peace, upon the ſtatute of 3. & 4. *Will. & Mary*, c. 10. for deer-ſtealing, being removed by *certiorari* into the king's bench, exceptions were taken to them, which were argued ſeveral times (*a*).

PARKER, *Chief Juſtice*, now delivered the reſolution of the whole Court to the following effect: — The great objection againſt theſe convictions is, that the juſtices of the peace have no authority to proceed againſt the party, and convict him of the offence in his abſence. As to this matter we are all of opinion, that the conviction is a good conviction, though taken in the abſence of the party. And here it is to be obſerved, that the ſtatute does not give the juſtices any particular direction, or preſcribe any particular form to be obſerved in the convictions before them; all that the ſtatute requires is, that this conviction be "by oath of one cre-
* [379] "dible witneſs." * So that the juſtices are not obliged to the obſervance of any rules, unleſs thoſe of natural juſtice, which all men are bound to obſerve. One of thoſe rules I readily own is, that the offender ſhould be heard before he be condemned. But this rule muſt admit of this limitation, *viz.* unleſs the party refuſe to appear. For as it would be unjuſt not to require the juſtices to *ſummon* the party, and give him notice to appear and make his defence, ſo to require more from the juſtices, would be to put it in the power of the offender to elude juſtice, and render his conviction impoſſible, by wilfully abſenting himſelf. As to the manner how this notice is to be given, the act being altogether ſilent, we muſt recur to natural juſtice, which only requires the party ſhould know when and where he is to appear and make his defence; and if he will then neither appear himſelf, nor truſt his defence to anybody elſe, it is highly reaſonable he ſhould be proceeded againſt; and not reap an advantage from a wilful and criminal abſence. But it is objected, that ſtatutes are beſt expounded by rules of common law; and that it is more agreeable to the forms obſerved by the common law, not to convict the party in his abſence. I readily admit the rule laid down by them, that ſtatutes are beſt expounded by rules of common law in like caſes; and will therefore examine how the common law proceeds in criminal caſes, where the party refuſes to appear. And firſt, in caſe of outlawry for treaſon or felony, the law interprets his abſence as a ſufficient evidence of his guilt; and without requiring further proof or ſatisfaction, the law accounts him guilty of the fact; corruption of blood, and forfeiture of eſtate, enſues. In real actions, the ſecond default is final and concluſive; and the Court, without regarding the merits of
* [380] the cauſe, will give judgment that he ſhall loſe his land. * Outlawry in leſſer crimes, or in perſonal actions, does not, as in the firſt caſe, in judgment of law, occaſion the party to be looked

(*a*) See S. C. ante, 248. 341.

upon

upon as guilty of the fact; or, as in the second case, occasion a judgment for the thing in demand; but is yet in its consequences more penal and fatal than if it did. For a restraint of the liberty of the party, if he can be found, the profits of the land while the outlawry remains in force, and all his goods and chattels forfeited to the king, together with an exclusion from the benefit and protection of the law, follow upon it. But it will be said, that for all these proceedings, the law has prescribed and directed all the forms and circumstances necessary to be observed in them. I proceed therefore to proceedings of a more *summary nature*, and consequently more resembling the case before us. The office of common-council-man is in law accounted a freehold; and yet nobody will say but a man may be amoved from it in his absence. To come now to proceedings in our own courts. Is it not our daily practice to set aside judgments irregularly obtained, grant attachments, &c. in the absence of the parties? Notice indeed must be given; but if the party will not appear, the Court proceeds without seeing or hearing. It is observable, that in some of the cases put before, the law proceeds to condemn the party not only in his absence, but for his absence, or, which is all one, esteems his absence so strong an argument of guilt, that further proof is esteemed superfluous; whereas here the justices only proceed to examine, whether the charge be true; and do not condemn the offender, but on proof by oath. *The case before us is like to the award of a writ of inquiry upon default, by common law. In many summary proceedings, there is no power given to oblige the party to appear; and that is the case here; there is no express words in the act by which it is given. By implication it cannot be given, unless it were of absolute necessity to the doing of justice; which I have shewn it is not. If this doctrine were true, it would follow that a member of a corporation might be arrested, in order to compel him to appear. By this rule the party must appear, though he think fit to confess the fact and pay the penalty. If courts of law, that are armed with a coercive power to bring the party in, do not, in the cases I have before mentioned, think themselves obliged, from the nature of the thing, to use this power; certainly we cannot expect it from justices of peace, who really are destitute of this power. Besides, I cannot see to what purpose this appearance before the justices is required. For when the party is before them, can they oblige him to make his defence? No, unless he pleases; and if he had pleased, he might have appeared without force; and yet the only end of his coming before them, is in order to make his defence. Lastly, the objection of not being forced to appear, cannot be made by the party; because if it be an error, it is one in favour of him who makes the objection; for this would be contrary to the general rule of law in other cases. But it is objected, that the summons is faulty; for it ought to appoint a particular hour of the day, place, &c. To this I answer, that as to this, the record stands thus: "*licèt summonitus, &c. ad hoc tempus, et hunc "locum, *defaltam fecit.*" Now this in strictness does necessarily import,

THE QUEEN *against* SIMPSON.

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THE QUEEN *againſt* SIMPSON.

import, that the ſummons was to appear upon that very ſpot as to place, and that very inſtant as to time, where and when the juſtices were aſſembled; otherwiſe it could not have been a default. And what the juſtices have returned, muſt, by us, be accounted true in every particular. But it is objected, that theſe ſorts of records are, as is very well known, not made up by the juſtices, according to the truth of the fact; but drawn up by advice of counſel, ſo as to obviate all the objections that may be made againſt them. To this it muſt be anſwered, that we ought to give credit to the juſtices of peace, in the execution of that power the law has intruſted them with; and that if the juſtices ſhould make a falſe return, whereby the party and juſtice are abuſed, they may be puniſhed.

The convictions were adjudged good (*a*).

(*a*) See Rex *v.* Kent, 2. Ld. Ray. 1546. Rex *v.* Venables, Stra. 630. 2. Ld. Ray. 1405. Reg. *v.* Dyer, Salk. 181. Reg. *v.* Green, *Ante*, 213. Rex *v.* Mallinſon, 2. Burr. 679.

Caſe 191.

The King *againſt* Hammond.

An indictment for a nuſance "*in communi* "*ſtrata ſive alta* "*via regia*," is good.

THIS CASE had formerly been argued (*a*); and now PARKER, *Chief Juſtice*, gave the reſolution of the Court.

The objections taken to this indictment were two:

FIRST, That the place where the nuſance was laid to be committed, was uncertainly alledged; for it is ſaid to be "*in communi* "*ſtrata ſive alta regia via*." To this the anſwer is, that the words "*communis ſtrata*," and "*regia via*," are ſynonymous expreſſions, and ſignify the ſame thing. The proper ſignification of the word "*ſtrata*" ſignifies a paved way; but now the word is uſed in a more general ſenſe; and for this purpoſe ſeveral authorities, both ancient and modern, were quoted. A navigable river is eſteemed a highway (*b*).

S. C. 1. Stra. 44. 2. Roll. Abr. 80. S. C. cited 1. And. 143.

* [383] * THE SECOND OBJECTION is, that it was not ſet forth from what place to what place the highway led, in which the nuſance was ſaid to be committed. The anſwer to this is infinite (*c*), and has no *terminus à quo*, nor *terminus ad quem* (*d*).

The indictment was held good.

(*a*) The indictment charged, that on ſuch a day, year, and place, the defendant ten loads of ſtraw and dung *in communi ſtrata ſive alta regia via poſuit et locavit et ibidem per diem dies remanere permiſit*, ſo that the king's ſubjects could not paſs. And on demurrer it was objected, that the nuſance was laid to be in one place or another, and being in the diſjunctive the Court could not intend *communis ſtrata* and *alta regia via* to be the ſame. S. C. 1. Stra. 44.

(*b*) Fitz. Abr. "Challenge," 279.

(*c*) Rex *v.* Thompſon, 10. *Will.* 3.

(*d*) Latch 183 3. Keb. 89.

Smith *againſt* Parks.

Caſe 192.

If in ejectment, on a forfeiture of a leaſe for non-payment of rent, the proceedings be ſtayed on bringing in the arrears, the Court, on affidavit that the defendant is a *ſoldier*, will oblige him to give ſecurity for the rents.

1. Mod. Caſes in Law and Equity, 343.

A LEASE being, in ſtrictneſs, forfeited by non-payment of rent, the leſſor brings an ejectment.

The leſſee by bringing into court what was due for arrears of rent with coſts, &c. obtained a rule to ſtay proceedings upon the ejectment (*a*).

The leſſor moved the Court to diſcharge the rule, unleſs the defendant would give ſecurity for the payment of rent, upon an affidavit that the defendant was a ſoldier, and ſo by law intitled to a protection.

THE COURT. If you will have equity you muſt do equity; if by the equity of the Court the plaintiff loſe the benefit of the forfeiture of the leaſe the law gives him, it is but reaſonable, that he ſhould have ſecurity for the payment of rent; eſpecially when it appears upon oath, that the defendant is ſuch a perſon, as is by law privileged from payment of his debts.

(*a*) See Phillips *v.* Doelittle, 8. Mod. 345. Goodtitle *v.* Holdfaſt, 2. Stra. 900. Stephenſon *v.* Noright, 2. Black. Rep. 746. Holdfaſt *v.* Morris, 2. Wilſ. 115.

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Chaplain *againſt* Southgate.

Caſe 193.

On a covenant for quiet enjoyment, a breach aſſigned, that having, or pretending to have a claim time out of mind, he entered and diſturbed the leſſee, is good.

Cro. Car. 5. Hob. 12. 1. Mod. 293. 3. Mod. 135. H. Bl. Rep. 275. 1. Term Rep. 671.

THIS was an ACTION OF COVENANT; and the caſe was this: The defendant leaſed to the plaintiff a farm called *Dale*; and there being a pretence of a right of common ſet up to two cloſes, comprehended in the * leaſe, the leſſor covenanted with the leſſee, that he ſhall quietly enjoy the ſaid two cloſes, againſt all claiming, or pretending to claim, any right in them.

Upon this covenant the leſſee brought his action, and aſſigned his breach thus: that ſuch a one having, or pretending to have, a claim time out of mind, did enter upon the ſaid cloſes.

To this the defendant demurred.

IT WAS INSISTED *by the defendant's Counſel*, that the covenant extended only to legal, not tortious claims; and therefore that the plaintiff ſhould have ſet forth, that the claim of him that diſturbed him was a legal one (*a*).

But THE COURT were of opinion, that the words of the covenant did extend to all interruptions whatſoever; and ſo was the plain intent and meaning of the parties; for if it was to extend to legal claims only, then would the tenant be put under the hardſhip of trying the right for the landlord; which was the very thing

(*a*) See Kirby *v.* Hanſaker, Cro. Jac. 315. Bickerſtaff's Caſe, Vaugh. 119. Teaſdale *v.* Eſſex, Cro. Eliz. 213. Perry *v.* Edwards, 1. Stra. 400.

CHAPLAIN *against* SOUTHGATE.

the tenant plainly designed to prevent by this covenant. This case is very different from the case of *Kirby v. Hanfacre*, for there it did not appear but the disturber might claim even under the lessee himself; but this is impossible here, by reason of those words, "time out of mind." The breach is well assigned.

Judgment was given for the plaintiff (*a*).

(*a*) See Lloyd *v.* Tompkins, 1. Term Rep. 671.

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Case 194.

Savill and his Wife *against* Kirby.

The spiritual court may proceed against a person for saying to or of a married woman, "*You are a bawd*;" nor will a prohibition lie on a suggestion that they were spoken in *Westminster*, and that an action had been brought for them in *the Marshalsea*.

THE SPIRITUAL COURT had proceeded against the defendant, for these words spoken against the wife, "You are a bawd."

The defendant moved for *a prohibition*, suggesting that these words were spoken at *Westminster*, and that the city of *Westminster* is an ancient city, and that there is an ancient custom within the * said city, that whores should be punished by imprisonment: suggesting likewise, that an action had been brought for these words in THE MARSHAL'S COURT, and verdict and judgment for the plaintiff; and that *nemo bis pro eodem delicto, &c.*; that this matter had been pleaded in the spiritual court; but that notwithstanding they had proceeded to sentence.

A rule was made to shew cause why, &c.

DR. ANDREWS, a civilian, and MR. NICHOLLS shewed cause upon that rule. The substance of their arguments was, that bawds are by the spiritual law accounted infamous, and their evidence rejected in all cases. That there had been a distinction taken between these words, "You keep a bawdy-house," and "You are a bawd." That the former words might be punishable in the temporal court by indictment, as importing a breach of the peace; but that the latter were punishable in the spiritual court only. A multitude of cases were quoted to prove that an action does not lie in the temporal courts for such sort of words, as "whore," "bawd," &c. (*a*).

Salk. 552.

Then it was argued, that admitting these words were actionable at common law, either in themselves, or accidentally, by reason of some temporal damage sustained by the words, yet this would not oust the spiritual court of their jurisdiction; for that both courts might have a concurrent jurisdiction of the same cause, where they proceed *diverso intuitu*, which was the case here; for the process in the spiritual court is *pro salute animæ et reformatione morum*, that in the * temporal court for *reparation in damages*; and for this purpose the following instances were given. A recovery by

*[386]

(*a*) Fitz. N. B. 51. 2. Roll. Abr. 296. 301. 1. Roll. 295. 5. Co. 31. Cro. Eliz. 582. Cro. Jac. 327. Carter, 55. 1. Vent. 220. 2. Keb. 612. Raym. 115. See also 6. Com. Dig. "Prohibition" (G. 14.).

husband

huſband in a temporal court of damages againſt the adulterer, is no bar to a proſecution in the ſpiritual court at the promotion of the huſband (*a*). The ſtatutes prohibiting under certain penalties the clergy to marry without licence, non-reſidence, and farming, do not ouſt the juriſdiction of the ſpiritual court (*b*). In the act of Uniformity, 1. *Eliz.* c. 2. and the late act for preventing of ſchiſm, there are ſpecial proviſo's, that the parties ſhall not be proſecuted in both courts, and *Exceptio probat regulam in rebus non exceptis (c)*. The ſame will often be proved in both courts, *viz.* temporal and ſpiritual; becauſe the proof in the one court eſtabliſhes it for lands, the other for chattels only (*d*). In *The Regiſter* (*e*) it is laid down as a general rule, that if the principal belong to the ſpiritual court, the acceſſory muſt be tried there too. It is common in temporal courts, in caſe of the battery of a ſervant, for different actions to be brought for the ſame battery; the one by the maſter, the other by the ſervant; and damages to be recovered in both; and yet the recovery in the one, cannot be pleaded in bar of the other (*f*).

It was argued, that the party by ſtanding out thus until ſentence, and then moving for a prohibition, overturned the proceedings in the ſpiritual court, and hindered the bringing of an appeal, which by the ſtatute of 23. *Hen.* 8. c. 9. muſt be brought within fifteen days after ſentence.

It was likewiſe inſiſted upon, that though it was pleaded, that there was a proſecution in THE MARSHAL'S COURT for the ſame words, yet it was not ſaid for the ſame words ſpoken at the ſame time, without which the plea can ſignify nothing.

* An objection was alſo taken to the ſuggeſtion, *viz.* that the wife only prayed to have the prohibition; for though by the practice of the ſpiritual court, *a feme-covert* may ſue ſingly, yet in the temporal court, both huſband and wife ought certainly to join in praying for a prohibition. * [387]

As to the cuſtom in *Weſtminſter* it was ſaid, that this was only matter of ſuggeſtion in this court, without any affidavit, and never laid by plea before the Court. That beſides, there was nothing more pretended in the cuſtom than what generally obtains all over *England*, *viz.* that ſuch ſort of perſons are generally ſent to a houſe of correction.

The rule was diſcharged.

(*a*) Salk. 552.
(*b*) Co. Lit. 96.
(*c*) Wingate.
(*d*)
(*e*) Reg. 15.
(*f*)

TRINITY TERM,

The Third of George the Firſt,

IN

The King's Bench.

Thomas *Lord* Parker, *Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Pratt, *Knt.*
Sir Edward Northey, *Knt. Attorney General.*
Sir William Thompſon, *Knt. Solicitor General.*

* The Pariſh of South Sidenham *againſt* The Pariſh of Lamerton. Caſe 195.

WILLS AND HIS WIFE were removed, by an order of juſtices, from the pariſh of *Lamerton* to the pariſh of *South Sidenham.*

If a perſon rents a farm in two pariſhes, of leſs than ten pounds a year in each, but above that value in both, he ſhall be ſettled in the pariſh where the houſe is ſituated.

S. C. Sett. & Rem. 77.
S. C. 1. Seſſ. Caſes, 122.
S. C. 1. Stra. 57.
S. C. Foley, 81.
S. C. 2. Bott. 624.

This order was removed into the court of king's bench.

The caſe ſtood thus: *Wills* took a leaſe of an intire tenement, for the term of ſixty years, if he and his wife and the leſſor ſhould live ſo long, at the rent of thirteen pounds and ten ſhillings a year. So much of this tenement as amounted to four pounds a year, was ſituated in the pariſh of *South Sidenham*, and ſo much as amounted to nine pounds ten ſhillings a year, with the houſe, in the pariſh of *Lamerton.*

The queſtion was, Whether this was a ſettlement within the ſtatute of 13. & 14. *Car.* 2. c. 12.

THE COURT was clearly of opinion that it was; for the words of the ſtatute are, "a tenement of the value of ten pounds a year;" ſo that the rent was not at all material, and the ſtatute does not ſay that all the tenement muſt be in the pariſh where he lives. So that this is a ſettlement within the words and letter of the act,

And

THE PARISH OF SOUTH SIDENHAM *againſt* THE PARISH OF LAMERTON.

* [390]

And as it is within the letter, ſo it is within the intention and reaſon of the act too; for the plain reaſon of the law is this, that it is not probable that a perſon ſhould become chargeable, who has ſo much credit as to be intruſted with the management of a farm of the value of ten pounds a year. * Indeed, if a man take ſeveral diſtinct tenements in ſeveral pariſhes, and both, or all of them, amount to ten pounds a year, this will not make a ſettlement; but here the tenement was one entire and diſtinct tenement.

Ante, 287.

EYRE, *Juſtice*, compared this to the caſe, where a man ſerves half a year, then is hired for a year, and ſerves only half that year; which is a ſettlement within the words and meaning of the act; for the words are ſatisfied by the hiring for a year, and ſervice for a year; and the meaning is alſo ſatisfied, becauſe a perſon of that ſtrength as to be hired for a year's ſervice, was not eſteemed by the act a perſon likely to become chargeable, but able to maintain himſelf by his bodily labour.

THE COURT. The ſettlement is at *Lamerton*, and therefore the order of removal to *South Sidenham* muſt be quaſhed.

A perſon cannot gain a ſettlement by reſiding on a leaſehold eſtate, as a *perſonal repreſentative*, unleſs he has *proved the will* or procured *letters of adminiſtration.*

A SECOND QUESTION in this caſe was, Whether the pauper had not gained a ſettlement in the pariſh of *South Sidenham*.

The caſe, as to this point, ſtated, that the mother of *Wills's* wife was poſſeſſed of a ſmall cottage, in the pariſh of *South Sidenham*, for a term of years determinable on the death of her daughter; that on the death of the mother, *Wills* entered upon the cottage in right of his wife; but did not take out letters of adminiſtration to his mother-in-law; but continued to live therein with his wife and family for twenty-five years, and until he removed into the pariſh of *Lamerton*, and took the tenement as above mentioned.

The queſtion therefore was, Whether *Wills* having by law a right to take out adminiſtration, and a right to the ſurplus of the eſtate (debts and funeral expences paid) of the perſon poſſeſſed of the term, as would in law intitle a man to a ſettlement, within the ſtatute of 13. & 14. *Car.* 2. c. 12. had, before adminiſtration actually taken out, ſuch an equitable intereſt, as would in law amount to a ſettlement?

IT WAS RESOLVED, that if a man have two ſettlements, he is to be eſteemed as ſettled in the place where he lives; and although it was in the election of *Wills* to ſettle himſelf in each place, yet it was not in the power of the juſtices to remove him from the place where he lived and was ſettled, to another place where he has likewiſe a right of ſettlement. So that admitting there was a ſettlement at *South Sidenham*, yet if there was a ſettlement in *Lamerton*, the place where he reſided, the order of juſtices to remove him muſt be quaſhed.

The

The queſtion therefore, Whether he had a ſettlement in *South Sidenham?* being immaterial, THE COURT gave no opinion on it (*a*).

THE PARISH OF SOUTH SIDENHAM *againſt* THE PARISH OF LAMBETH.

(*a*) It is ſaid, S. C. Sett. & Rem. 103. that it was held, that he had not a ſettlement in *South Sydenham*, for that he had only a right, which was not veſted in him until he had taken out adminiſtration, S. C. Bott. P. L. 624. pl. 554. And this is confirmed by Rex *v.* Wedworthy, Burr. S. C. 109. Rex *v.* Lower Swell, Burr. S. C. 436. Rex *v.* North Curry, Cald. 137. But the defect of not taking out adminiſtration ſeems cured by his having reſided upon the cottage for *twenty years*. See Aſhbrittle *v.* Wyley, 1. Stra. 608. Rex *v.* Garway, Burr. S. C. 632. Rex *v.* Bitton, Burr. S. C. 631.

Hewett *againſt* Bainard.

Caſe 196.

A WRIT OF ERROR was brought on a judgment in the court of common pleas.

If a juror be withdrawn from the panel by conſent of both parties, in order that the trial may go off *pro defectu juratorum*, he may be of the jury when the cauſe comes on again.

The ſingle queſtion was, Whether a juror, who was withdrawn from the panel by the conſent of both parties, to the intent that the trial might for that time go off *pro defectu juratorum*, may not be of the jury, when the cauſe comes to be tried at a ſubſequent time; and if he be, whether that will be error?

IT WAS INSISTED, that it would be error; and that a juror withdrawn from the panel, was for ever after incapable to try the cauſe. And a caſe in 3. *Cro.* 430. was much relied upon, which was, that if a juror who had been once challenged, and the challenge allowed by the Court, ſhould afterwards try the cauſe, it would be error.

TO THIS *it was anſwered*, that the caſe cited was vaſtly different from the caſe at bar; for the caſe in *Croke*, is the caſe of a perſon challenged by one of the parties, as not ſtanding indifferent to both ſides, and * this challenge allowed of by the Court, which amounts to a kind of judgment; and therefore as long as it ſtood, though the cauſe upon which that challenge was founded, ceaſed, the perſon was incapable to try the cauſe; whereas here the juror is withdrawn from the panel by conſent of both ſides, for no other reaſon, but that the cauſe may be put off *pro defectu juratorum*; and therefore a perſon ſo withdrawn is to be conſidered as if he had never been returned; and conſequently no more unfit to try the cauſe than any other. A caſe in *Fitzherbert (a)* was quoted, where after a challenge to the array, for the partiality of the ſheriff, the very ſame jury was returned by the coroner, and allowed to be well; which caſe, in the reaſon of it, was ſaid to be ſtronger than this; becauſe though a challenge to the array, be upon account of partiality in the returning officer, yet it is upon the conſideration the law has, that partiality in the returning officer will produce a partial jury; whereas here, upon the whole record, there

* [391]

(*a*) Fitz. Abr. "Challenge," 122.

in

HEWET against RAINARD.

is nothing that caſts the leaſt reflection or imputation of partiality upon the juror; nothing that hinders him from being "*talis*, "*&c.*" If this be error, it would certainly be a good cauſe of challenge; and yet it is neither a principal challenge, nor to the favour (*a*).

As to the objection, that it ſhall now be preſumed, that there was a good reaſon for his being withdrawn from the jury, and agreed ſo by both ſides, though the ſame do not at preſent appear, it was anſwered, that the reaſon why he was withdrawn does appear upon record; and ſuch a reaſon as does not at all impeach him of partiality, *viz.* the reaſon was, that it being neceſſary for the jury to have *a view*, this man happening to be the laſt upon the panel was withdrawn, that ſo the cauſe might be put off *pro defectu juratorum*.

THE COURT were clear in their opinion, that this man's trying the cauſe was no error.

The judgment was affirmed.

(*a*) Co. Lit. 157.

*[392]

Caſe 197. * The Pariſh of Horton *againſt* The Pariſh of Houghton.

If a ſervant be hired for *eleven months*, and then leave his place for a week, and then is hired for another eleven months, and then again leave his place for a week, &c. theſe ſeveral hirings cannot be conſtrued ſo as to make a hiring and ſervice for a year.

S.C. 1. Stra. 83. S. C. Sett. & Rem. 78. S. C. Foley, 146.

THE CASE, as ſtated upon the order, was thus: A ſervant was hired for eleven months; he then went home with his cloaths to his father for a week; afterwards he was hired by the ſame perſon for eleven months more; he then went home for a week; and ſo, &c.

The queſtion was, Whether this was a ſettlement?

It was inſiſted, that it was not. It appears by ſeveral reſolutions, that there muſt be a ſervice for a year, and a hiring for a year. In the caſe of *Dunsfold v. Ridgwick* (*a*), it was held, that there muſt be a hiring for a year, as well as a ſervice for a year. In the caſe of *Overton v. Steepleton* (*b*), a ſervant was hired for half-a-year, and ſerved accordingly; then he was hired for a year, and ſerved half-a-year; and though it was reſolved that this was a ſettlement, notwithſtanding the ſervice was not ſubſequent to the hiring; yet ſtill it was held neceſſary, that there ſhould be a ſervice for a year, and a hiring for a year. In the caſe of *Frencham v. Pepperharrow* (*c*), a ſervant was hired from the third of *October* to *Michaelmas*, three days ſhort of a year; and then by agreement, he ſtayed as many days longer as completed the year, and it was held to be no ſettlement.

(*a*) 1. Salk. 535.

(*b*) Burr. S. C. 549. This caſe is alſo imperfectly reported in Fort 316. Ld. Ray. 426. Sett. & Rem. 255. pl. 295. 3. Salk. 257. and 12. Mod. 224.

(*c*) Ante, 293. S. C. Foley, 135. S. C. Fort. 322. But ſee this caſe Sett. & Rem. No. 80. page 56.

ON

ON THE OTHER SIDE *it was ſaid*, that if this be no ſettlement, the act of parliament is eluded; and there will be no more ſettlements in this pariſh by virtue of it. That the fraud was very apparent from the circumſtances of the caſe; and that it is a rule in pleading, that nothing needs be averred, that appears ſufficiently without. * That the reaſon upon which this act of parliament was founded, was, that a perſon of that bodily ſtrength as that any perſon ſhall think fit to hire him for a year, is not ſuch a perſon the law preſumes likely to become chargeable. Beſides, ſome regard was to be had to ſervants that they ſhould gain a ſettlement, and not be hurried from place to place.

Ante, 390.

PARKER, *Chief Juſtice*, was of this opinion.

PRATT, *Juſtice*, *contra*. The law muſt now be taken, that a hiring for a year, as well as ſervice for a year, is neceſſary. I ſee not, but that if this agreement was made purpoſely, by way of caution to prevent a charge upon the pariſh, the intent was lawful, and we have nothing to do with it. Beſides, we cannot judge of fraud; that belongs to the juſtices. We cannot adjudge, that a demand and a refuſal amount to a converſion, though a jury may and will.

Adjournatur (a).

(a) The Court at the end of the Term held, that as the caſe now ſtands, the ſeveral hirings and ſervices that were ſtated could give no ſettlement, S. C. 1. Stra. 85. See alſo Coombe *v.* Weſtwoodhay, 1. Stra. 143. Rex *v.* Weſtwell, 1. Barn. 354. Rex *v.* South Cerney, 2. Conſt's P. L. 406. Rex *v.* Newton, Burr. S. C. 157. Rex *v.* Ham, Burr. S. C. 304. Rex *v.* Syderſtone, Cald. 19. S. C. Dougl. 424. *notis*. Rex *v.* Hanwood, Dougl. 423. S. C. Cald. 100. Rex *v.* Murſley, 1. Term Rep. 694. Rex *v.* Martin, 4. Term Rep. 257.

MICHAELMAS TERM,

The Fourth of George the Firſt,

IN

The King's Bench.

Thomas *Lord* Parker, *Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Pratt, *Knt.* } *Juſtices.*

Sir Edward Northey, *Knt. Attorney General.*
Sir William Thompſon, *Knt. Solicitor General.*

Caſe 198.

* Parks *againſt* Crawford.

THIS was an action of eſcape, brought againſt THE MARSHAL of the king's bench, upon the ſtatute of 8. & 9. *Will.* 3. c. 27. ſ. 9. the words of which ſtatute are, "That "if the marſhal or warden for the time being, or their reſpective "deputies, ſhall, after one day's notice in writing given for that "purpoſe, refuſe to ſhew any priſoner, committed in execution, to "the creditor at whoſe ſuit ſuch priſoner was committed, or "to his attorney, every ſuch refuſal ſhall be adjudged an eſcape in "law."

If notice to produce a priſoner be given to the marſhal on a *Friday*, and a demand to ſee the priſoner made on a turnkey at twelve o'clock on the ſucceeding *Tueſday*, this is a ſufficient notice and demand to maintain an action for an eſcape againſt the marſhal.

In this caſe, the notice was given by the creditor upon the *Friday*, to produce the priſoner upon the *Tueſday*. At twelve o'clock the priſoner was demanded of THE TURNKEY; but not being produced, the action was brought.

This being the ſtate of the caſe, THE POSTEA was ſtayed by the direction of *Chief Juſtice* PARKER, who tried the cauſe.

* And it was now objected, FIRST, that the notice was inſufficient; and that SECONDLY, if the notice was ſufficient, the demand and refuſal were not alledged as they ought to be.

It

PARKS. *againſt* LAWFORD.

It was obſerved, that this ſtatute was a penal ſtatute; becauſe it ſubjected the gaoler to make ſatisfaction to the plaintiff, where poſſibly the plaintiff was not at all injured: that therefore ſuch an interpretation was to be put upon the act as might not ſubject the gaoler to unreaſonable and unneceſſary difficulties. It was likewiſe obſerved, that the act of parliament had directed no particular ſort of notice; and that conſequently the notice, as to the nature of it, muſt be governed by the rules of common law. The ſtatute is ſilent as to the place where the priſoner is to be produced; this the law ſupplies, and ſays "the priſon;" for it will not be pretended, that by this ſtatute the gaoler is bound to produce the priſoner at whatever place the creditor ſhall pleaſe to appoint. So again, as to the time to be ſpecified in the notice for the producing of the priſoner, the act is altogether ſilent; yet certainly there muſt be a time ſpecified in the notice; for it will not be pretended, that a notice from the creditor to produce the priſoner generally, without appointing any time, would be good. It will not be pretended, that upon ſuch notice the marſhal will be obliged to produce the priſoner a week, a month, a year after, whenever it ſhould pleaſe the creditor to demand him; for this would be at once to blow up the rules of the priſon, which was certainly never the intention of the act, which, in requiring a day's notice, does evidently ſuppoſe the priſoner may poſſibly have the benefit of the rules. The queſtion now therefore is, Whether the time appointed by this notice be certain enough? or, Whether it ought [396] not to have been confined to ſome particular * part of the day; and not ſaid on ſuch a day generally? It was ſaid, that in confining the notice to ſome particular hour or portion of time in the day, the inconvenience to the plaintiff could be none at all; becauſe he had it in his own power to appoint that time which would be moſt convenient for him; whereas on the other hand, the marſhal would be expoſed to the trouble of an unneceſſary attendance, as not knowing what time of the day the creditor would demand him. But if it ſhould be ſaid here, as probably it may, that the plaintiff having ſpecified no particular time in the day, the law appoints a time, *viz.* the laſt hour in that day, unleſs by mutual conſent the parties do it ſooner; then, SECONDLY, the demand is faulty, being made at twelve o'clock at noon, when the defendant had until the cloſe of the evening for the performance of it.

3. Mod. 70. 219.

Demand inſufficient, in regard to the perſon upon whom it was made.

A SECOND OBJECTION as to the demand was, in reſpect to the perſon upon whom the demand was made, *viz.* the turnkey.

It was obſerved, from other clauſes in the act, that by the word "deputy" was to be underſtood a deputy-marſhal, *viz.* ſuch a deputy as an action may be brought againſt; and not any inferior officer, as a turnkey, &c. If it ſhould be ſaid, that the deputy-marſhal ſeldom or never attends, and that conſequently it would be next to impoſſible for the creditor to make the demand of the marſhal or his deputy, it was anſwered, that it muſt be ſuppoſed that the marſhal or his deputy are attending the duty of their

their office; and that ſhould a creditor not be able, by reaſon of their abſence, to have the benefit of this act of parliament, the Court would puniſh them for their non-attendance. PARKE *againſt* CRAWFORD.

* THE COURT ſeemed inclined to think, that the marſhal had all that day for the producing of the priſoner. They ſeemed likewiſe to think, that by the word "deputy" was to be underſtood a deputy-marſhal, and not a more inferior officer; but that, however, the plaintiff could not ſuffer by their non-attendance; becauſe a demand at the priſon, though nobody was there, would be ſufficient. * [397]

Adjournatur.

Memorandum. Caſe 198.

LORD COWPER ſurrendered the ſeals in the Vacation.

EASTER TERM,

The Fourth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

Slingſby *againſt* ——.

Caſe 200.

THE INTEREST of five hundred pounds was ſettled to be paid to the wife for life; then the principal and intereſt to truſtees, "to be paid to ſuch daughter or daughters as ſhall "be begotten upon the body of the wife, ſhare and ſhare alike; "but if the huſband ſhall die without any daughters, then the "money was to be paid to the wife."

A ſettlement of money to be paid to ſuch children. "as "ſhall be be- "gotten, &c." but "that if "the huſband "ſhall die "without any "children, then "the ſaid mo- "ney ſhall be "paid to *A.*" extends to a child *in eſſe* at the time the ſettlement was made.

S. C. 2. Eq. Abr. 658.

At the time of making this ſettlement, there was a daughter, *Anne*; and the huſband died without any other daughter.

IT WAS INSISTED, that this daughter was entitled to nothing under this ſettlement; becauſe being *in eſſe* at the time when it was made, ſhe was not within the words of the ſettlement, which run in the future tenſe, "as *ſhall* be begotten upon the body of the "wife, ſhare and ſhare alike."

But PARKER, *Lord Chancellor*, declared, that this was to put the moſt abſurd interpretation upon a ſettlement that could be ſuppoſed, *viz.* that parents ſhould be ſolicitous for children in *embrio* and unborn, and take no care of a child *in eſſe*; that the futurity meant by the ſettlement did not relate to the time of the birth of the daughters, but to the death of the huſband; at which time all the daughters then in being, that were the offſpring of that coverture, became intitled to the money by this ſettlement.

Caſe 201. ——— *againſt* Mortimer Powell.

If a teſtator is indebted to his executor for goods in the way of trade, a deviſe to the executor of a much larger ſum than the debt amounts to ſhall not extinguiſh the debt.

THIS was a caſe ariſing from the will of *John Rawlins*.

The queſtion now reſerved for the conſideration of the Court, upon a ſpecial report of the maſter directed by the Court, was, Whether a debt of three hundred pounds, due to *Powell* the executrix, ſhould be ſunk in a legacy of five hundred pounds given her by the ſame will?

The bill was brought by next of kin, againſt the executrix, to have the ſurplus of the eſtate, undiſpoſed of by the will, divided according to the ſtatute of Diſtributions. And the defendant had by her anſwer ſubmitted, * that the ſurplus ſhould be divided according to that ſtatute; but inſiſted upon a debt of three hundred pounds, as what ſhe ought to have ſatisfaction for, over and above her legacy. The bill did, beſides, ſeek a diſcovery of the aſſets of the eſtate in the hands of the defendant.

* [399]

S. C. 2. Eq. Abr. 354.

Upon this IT WAS DECREED, that the defendant ſhould account for the ſurplus, which ſhould be divided according to the ſtatute of Diſtributions; and as to the debt, it was directed, that THE MASTER ſhould look into it, and ſtate both the *quantum* and nature of it.

And now upon THE MASTER's report, who found the teſtator's debt to the defendant near that ſum; and that the debt had ſprung from dealings in trade between them;

IT WAS URGED as a known rule and courſe of the court of chancery, that where a debtor, by his will, gives to his creditor a legacy ſuperior in value to the debt due, the debt was always ſunk in the legacy, unleſs it evidently appear, from ſtrong circumſtances in the will, that it was intended otherwiſe as a beneficial legacy. And this was ſaid to be founded upon that maxim in the civil law, "*Debitor non præſumitur donare.*" This was further enforced from *Chauncy's Caſe (a)*, where it had been ſo ruled by THE MASTER OF THE ROLLS a Term or two ago.

THIS WAS OPPOSED *by the defendant's Counſel*, who diſtinguiſhed this from the *caſe of Chauncy* thus: A ſervant-maid had lived long in a place without receiving any wages; her wages were at laſt by the maſter computed to amount to a hundred pounds, and a bond given for the ſame; the maſter ſoon after dying gave her a legacy of five hundred pounds, which he thus expreſſed, "for her faithful ſervices." Now it was ſaid, that this bond being for the money due for her ſervice, and this legacy being given her for her faithful ſervices, it was plain, that the teſtator intended * this legacy in ſatisfaction of all that was due to her.

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(a) 1, Peer. Wms. 409.

ON

ON THE OTHER SIDE, the caſe of *Cuthbert v. Peacock (a)* was inſiſted upon, where the contrary was ruled by LORD COWPER, ſaying, it was good equity to make the teſtator both juſt and generous, if he intended to be both. This interpretation is moſt agreeable to the words of the will, where it is expreſſed as a gift. Now a man is never ſaid *to give* but *to pay* a debt. It was ſaid further, that ſince it may be the executrix would not have been decreed to account for the ſurplus without her conſent, it would be the harder upon her to ſink her debt.

againſt MORTIMER POWELL.

2. Vern. 593, 594.

PARKER, *Lord Chancellor.* Let her have her legacy over and above her debt. I have the more compaſſion for this executrix, becauſe of her ſubmiſſion to account for the ſurplus. I am not ſatisfied with that notion, that a legacy to an executor excludes him from the ſurplus; and therefore without her ſubmiſſion, I know not whether I ſhould have decreed her to account for it.

MR. COWPER upon this told the Court, that the firſt time this doctrine prevailed was in the caſe of *Foſter v. Mount (b)*, ſince which time there have been ſeveral decrees in purſuance of it. But that the contrary doctrine had prevailed in the caſe of *Littlebury v. Buckley (c)*, where it was reſolved, that notwithſtanding the legacy, the executor ſhould have the ſurplus. Indeed, there it appeared by parol evidence, that it was the intention of the teſtator that the executor ſhould have the ſurplus; *Lord Guernſey*, for it went up into the houſe of lords (*d*), being of opinion, that parol evidence not repugnant to the will, and in affirmance of the rules of common law, ſhould be allowed of. Since that caſe, it has * been ſo decreed by LORD COWPER, without the help of ſuch evidence (*e*).

* [401]

Ante, 99.
2. Vern. 593, 594.

(*a*) Salk. 155.

(*b*) 2. Vern. 473. S. C. 1. Eq. Abr. 243.—See alſo 2. Vern. 674. 677.

(*c*) 2. Vern. 677.

(*d*) 1. Bro. P. C. 340.

(*e*) *Mrs. Fiſher* being indebted to *Cranmer* in fifty pounds made him her executor, with a legacy of five hundred pounds, and afterwards borrowed a hundred and fifty pounds more; and HARCOURT, *Lord Chancellor*, reverſed the decree for payment of the legacy and both the debts, for that there was no pretence that the legacy ſhould go in ſatisfaction of the after-debt, and a court of equity ought not to ſay when a man gives a legacy that he pays a debt. Cranmer's Caſe, 1. Salk. 508.—See Thomas *v.* Burnet, 2. Peer. Wms. 341. 3. Peer. Wms. 353.

Aſhton *againſt* ———.

Caſe 202.

THE QUESTION in this caſe aroſe upon the penning of a marriage-ſettlement of *Sir Ralph Aſhton*, and upon that clauſe of it which related to a proviſion for younger children. By that clauſe, after the creating of a term of ninety-nine years, and veſting it in truſtees for that purpoſe, it was "PROVIDED, that in caſe he had both ſons and daughters, the daughters ſhould have a thouſand pounds each, to be paid them at the age of twenty-one, or day of marriage, which ſhould firſt happen; if there were no ſon, and but one daughter, then ſhe was to have five thouſand pounds; but

Marriage-ſettlement. Portions for younger children decreed to be raiſed by ſale.

ASHTON *againſt*

but if there were more daughters, then there were to be eight thouſand pounds equally divided among them; which ſums were to be raiſed out of the rents, iſſues, and profits of the eſtate, "as "ſoon as they conveniently could."

The father died, leaving three daughters and no ſon. The three daughters bring their bill to have the eight thouſand pounds raiſed by way of mortgage or ſale, and for the intereſt of the money from the time of their father's death.

2. Vern. 420, 421. 424.

IT WAS URGED *for the plaintiffs*, that there had been many caſes where a term being created for the raiſing of portions for younger children, to be paid out of the rents, iſſues, and profits of the eſtate, and not ſaid by ſale or mortgage, yet this Court has decreed a ſale or mortgage, if that has appeared to be the moſt convenient way for the raiſing of it (*a*). "Profits" is a word of large extent; a grant of the profits of land is, in law, a grant of the land itſelf (*b*). It was obſerved, that this practice of the court of chancery was very rational, and in ſupport of the intention of the parties; becauſe it was for the preferment of daughters in marriage.

* [402]

* THE COUNSEL *of the other ſide* acknowledged, that there were ſeveral caſes wherein this Court had decreed a ſale or mortgage, though thoſe words were omitted; but then they ſaid, that this diſtinction was to be obſerved, *viz.* that the court of chancery had exerciſed this power where, a time being limited for the payment of the portions, it appeared altogether impoſſible that they could be raiſed within the time ſo limited, by the annual profits, rents, &c. but that here no time at all was limited.

THE COUNSEL *for the plaintiffs* replied, that here was a time limited for the payment of theſe portions, *viz.* upon the death of the father without iſſue male; for then, ſays the deed, the portions ſhall be raiſed "as ſoon as conveniently they may," which is in judgment of law preſently, from which time the portions are to carry intereſt.

PARKER, *Lord Chancellor*, was of this opinion, and decreed it accordingly.

(*a*) Stanhope *v.* Thacker, Prec. Chan. 435. 2. Chan. Rep. 204.

(*b*) Ante, 94. 365.

Caſe 203.

Target *againſt* Grant.

If *A.* deviſe a term to his ſon *B.* during his minority, but if he arrive at age for his natural life, with remainder to ſuch iſſue as *B.* ſhould deviſe it to, *B.* takes only an eſtate for life, with a power of diſpoſing of it to ſuch of his iſſue as he thinks fit.—S. C. 1. Eq. Abr. 193. S. C. Gilb. Rep. Eq. 149. S. C. 1. Peer. Wms. 432.

A TERM was deviſed by *William Target* to *Henry* his ſon during his minority; and if he attained the age of twenty-one years, then it was deviſed to him for the term of his natural life, and no longer; remainder to ſuch of his iſſue to be begotten as he

the

the ſaid *Henry* ſhould deviſe the ſame unto *(a)*; and if he ſhould die without iſſue, the reſt and reſidue of the term was deviſed to his brother *Albinus Target*. TARGET *againſt* GRANT.

The queſtion was, Whether this was an eſtate-tail in *Henry*, or not? for if it was, or in the nature of an eſtate-tail, the remainder to *Albinus* would be void.

IT WAS URGED, that this was an eſtate-tail by implication; becauſe it was, "and if he died without iſſue" generally, and not "without iſſue living at the time of his death."

* IT WAS ARGUED *on the other ſide*, that this was not an eſtate-tail; for though an eſtate-tail has been held good by way of implication, that was ever in maintenance of the intention of the deviſor; whereas here, to make an eſtate-tail by implication, or an eſtate in nature of an entail, was to defeat the intention of the deviſor, and make that remainder void which he intended ſhould be good. Caſes quoted in argument of the caſe: *Popham v. Bamfield* *(b)*, *Peacock v. Spooner* *(c)*, *Loddington v. Kime* *(d)*. * [403]

PARKER, *Lord Chancellor*. *Henry* by this will takes only an eſtate for life, with a power of diſpoſing of it to which of his iſſue he thinks fit; the words "no longer" plainly ſhew this to have been the intention of the teſtator. Where an entail is created by implication, it is ever in favour of the heir at law; to whom no eſtate being given by the will, ſo as to enable him to take by purchaſe, and there being a neceſſity, if he takes at all, of his taking by deſcent; therefore to ſupport the intention of the teſtator that the heir ſhould take, the law creates by implication an eſtate-tail in the anceſtor, to veſt it in the iſſue by deſcent. But here this reaſon entirely ceaſes; for here is a proviſion how it ſhall go to the iſſue, *viz.* by the deviſe of the party; until when nothing veſts in the iſſue. The words "dying without iſſue" are capable of two ſenſes *(e)*, *viz.* a legal one, and a vulgar one: a legal one, wherein a man is ſaid to die without iſſue whenever his iſſue fails, though ſome ages after the death of the party; and in this ſenſe, for the ſupport of the intention of the parties, the words ſhall be underſtood; but never for the deſtruction. The vulgar acceptation of the words, which I embrace here, is, "dying "without iſſue living at the time of his death." The caſe of *Loddington v. Kime* *(f)* is wrong reported by *Levinz* *(g)*, though of Counſel in it; but as to this point it is right enough, and a ſtrong caſe *(h)*.

(*a*) See 1. Peer. Wms. 432.
(*b*) 1. Vern. 79. 167. 344.
(*c*) 2. Freem. 114. 2. Vern. 143. 395.
(*d*) 3. Lev. 431. 1. Ld. Ray. 203. Salk. 224.
(*e*) See Nichols *v.* Hooper, 1. Peer. Wms. 564.
(*f*) 3. Salk. 300.
(*g*) 3. Lev. 431.
(*h*) See Atkinſon *v.* Hutchinſon, 3. Peer. Wms. 260. and Mr. Cox's references at the end of the caſe.

Case 204.

* Nab *against* Nab.

If *A.* devise all her personal estate to *B.* to be disposed of as *B.* shall think fit, and add by parol, "You may, if "you please, "give 1001. to "my niece;" *B.* on a bill in the answer to which the parol declaration is admitted, shall be decreed to pay the 1001. to the niece.

ONE OF THE POINTS IN THIS CASE, besides matter of account, was this:

A daughter devised all her personal estate to her mother, to dispose of as she should think fit; and then adds, by word of mouth, "You may, if you please, give one hundred and eighty "pounds to my niece; but I leave it entirely to you."

The niece brings her bill for this one hundred and eighty pounds, and likewise suggests a secret trust in the mother as to the one hundred and eighty pounds.

The mother in her declaration owns the will, and the parol declaration of the daughter; and that she once had it in her thoughts to have made the one hundred and eighty pounds two hundred pounds; but that the niece had since behaved herself so, that she was now resolved to give her nothing.

It was proved in the cause for the plaintiff, that the daughter, after making the will, had said, she had left her niece, the plaintiff, one hundred and eighty pounds as a legacy. But the parol declaration of the daughter appeared only by the answer of the defendant upon oath.

The case of *Kingsman v. Kingsman (a)* was chiefly insisted upon for the plaintiff. There the plaintiff thought fit to disinherit his son in favour of a waterman who had the good fortune to be of his name; and then tells the waterman, if his son should behave himself respectfully to him, and not disturb him in the enjoyment of his estate, he might, if he thought fit, give him twenty or forty pounds a quarter; and here, though an ejectment was brought at common law by the heir for the whole estate, and after that a bill in equity, yet the waterman was by this Court decreed to pay the forty pounds a quarter. It was likewise held in this case, that if the statute of Frauds be not insisted upon, the Court will compel the performance of an agreement, though not in writing.

* [405] * PARKER, *Lord Chancellor*. There is no colour for this to be looked upon as a legacy; because not in writing within the time appointed by the act (*b*). The mother is to be esteemed as a trustee for the niece. It is not necessary, by the statute of Frauds, for a trust, that relates to the personalty, to be in writing; if it were, it is now in writing by the answer. This is not such a trust as not to be forfeited; but then the mother should have assigned some particular instance of misbehaviour in the niece, and not in general only. The mother must pay the one hundred and eighty pounds, but without interest. As there is no proof of the parol declaration of the daughter but by the answer of the mother, the

(*a*) 2. Vern. 559. (*b*) Six days.

answer

anſwer muſt be taken entirely as it is, and no part of it muſt be impeached by any other evidence.

NAB *againſt* NAB.

Memorandum.

Caſe 205.

IN this Term, PARKER, *Chief Juſtice* of the Court of King's Bench, was made Lord Chancellor, and SIR JOHN PRATT, *Knight*, ſucceeded him as Chief Juſtice.

FORTESCUE, *Baron*, came down into the Court of King's Bench, and was ſucceeded by SIR FRANCIS PAGE, *Knight*, the King's Serjeant.

NORTHEY, *Attorney General*, was removed from his office, and was ſucceeded by NICHOLAS LECHMERE, *Eſquire*.

TRINITY TERM,

The Fourth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Nicholas Lechmere, *Eſq. Attorney General.*
Sir William Thompſon, *Knt. Solicitor General.*

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* [406]

* Thornby *againſt* Fleetwood.

Caſe 206.

JUDGMENT being given for the defendant in the court of common pleas, and a writ of error brought in the court of king's bench,

A *common recovery* ſuffered by a papiſt tenant in tail, for the purpoſe of making a marriage-ſettlement is good; for he is not a purchaſer within the ſtatute 1. *Jac.* 1. c. 4. ſ. 6. Ante, 113. 356. S. C. Comy. Rep. 207. S. C. 1. Stra. 318. S. C. 2. Bro. P. C. 203.

SIR THOMAS POWYS argued for the plaintiff in error to the following purpoſe: The great and chief, though not the only queſtion in this caſe is, the conſtruction that is to be put upon the ſtatute 1. *Jac.* 1. c. 4. It will be material to reflect a little both upon the end of this act of parliament, and the time when it was made. As to the end and deſign of it, It is plainly levelled againſt popery, and to ſecure and preſerve the reformed religion. As to the time when it was made, Every one converſant in our hiſtory knows the continual ſtruggles between the popiſh and proteſtant intereſt, in the time of *Queen Elizabeth*. And the education of youth in popiſh ſeminaries being thought at that time a thing of dangerous conſequence to the proteſtant religion, it was * provided againſt by an act of parliament in the time of *Queen Elizabeth*; but that act of parliament proving inſufficient, this act of parliament, upon which the preſent queſtion depends, was made in the firſt ſeſſion of the firſt parliament of *King James the Firſt*. It is not therefore to be ſuppoſed that this ſtatute, relating to a matter

* [407]

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matter the parliament ſhewed ſuch an immediate concern for, ſhould come into the world ſtill-born, without life and energy. This act of parliament conſiſts of two parts: By the firſt, the *Roman* Catholics are diſabled from acquiring anything new; by the ſecond, they are diſabled to retain what they are already poſſeſſed of. The preſent queſtion depends upon the firſt of theſe. It will not be denied, but that the words in the act (if the ſavings to the poſterity, and in caſe of conformity, were out of the way) are full and comprehenſive enough to prevent any eſtate veſting in *Roman* Catholics. It was reſolved in *Lord De La War's Caſe* (*a*), that he never was a baron; and yet the words are not ſtronger than theſe in this act. It muſt likewiſe be granted, that papiſts are diſabled from taking any manner of way, by ſtatute of 11. & 12. *Will.* 3. c. 4. and yet the words there uſed are not ſtronger than thoſe uſed in this. The ſame words are uſed in ſtatute 31. *Eliz.* c. 6. for prevention of ſimony. Now the interpretation always put upon this act has been, that whoever came in ſimoniacally by induction gained nothing. A ſimoniacal contract has ever been eſteemed a good defence to an action brought for tithes. The words of the act, as to the ſaving to the heir, are, "in reſpect of "himſelf only, but not his heirs or poſterity." Hence it is argued, that the eſtate muſt veſt in the anceſtor, or elſe the ſaving to the poſterity will be fruſtrated. * In anſwer to this objection it is proper to obſerve, that this clauſe relates equally to goods, chattels, terms for years, caſes wherein the heir is not concerned, as well as to inheritances deſcendible to the heir; that therefore the ſame interpretation ought to be put upon the act in both caſes. Now it is plainly abſurd to underſtand the act of taking the profits of goods, money, &c. It is a general rule, that *Exceptio probat regulam in rebus non exceptis*; the ſaying, therefore, the right of the heir works more ſtrongly and totally to the excluſion of the anceſtor. Another rule to be obſerved in the interpretation of ſtatutes is, that a ſaving or an exception in a ſtatute muſt never be ſo interpreted as totally to deſtroy the purview. Now here the Counſel for the defendant are endeavouring, in favour of the heir (a ſecondary conſideration of the parliament), to overthrow the primary and principal intention of the act, *viz.* the diſabling of the anceſtor. But then it will be aſked, What is the uſe of the ſaving clauſe? To this it may be anſwered, Firſt, that it was to ſhew that the incapacity was only perſonal, worked no corruption of blood, &c. Nor is it any objection againſt this, that in this reſpect it is entirely unneceſſary; for ſaving clauſes are often inſerted in acts of parliament for the ſatisfaction of ignorant people. Secondly, The heir is by this means enabled to derive his title from the father, though never ſeiſed, as if he had actually been ſeiſed. The interpretations contended for by them, that inveſts the *Roman* Catholic with ſuch an intereſt in the eſtate as will enable him to alien and diſpoſe of the eſtate, by recovery, &c. at

* [408]

(*a*) 11. Co. 1.

pleaſure,

pleaſure, but reſtrains him only from taking the profits, is ſuch a one as can neither be collected from the words or deſign of the act. * It has been before obſerved, that theſe words, "take, "enjoy, &c." are extended to goods and chattels as well as inheritances; and that this being one entire clauſe, ought to receive an uniform interpretation; but this interpretation of theirs, when applied to chattels, is plainly abſurd. Beſides, this interpretation is plainly contrary to the words of the act, which are univerſally excluſive, without any exception or qualification whatſoever; whereas, according to this interpretation, he muſt inherit, he muſt take, and be owner; and as ſuch, alien and diſpoſe at pleaſure, by fine, &c. If the queſtion is aſked them, Who ſhall take the profits? they are much at a loſs; a plain argument that their interpretation was never thought upon by the law-makers, who otherwiſe would in plain and clear terms have told us who ſhould take the profits, as they have done in the following act of 3. *Jac.* 1. c. 5. The act therefore being ſilent in this caſe, they tell us, that according to the rules of law in other caſes, the crown ſhall take them. But this is to bring the act to juſt nothing; for it is clear law, that alienation before ſeiſin will ouſt the crown of this intereſt they are ſo liberal in beſtowing upon it (*a*). But then however we are told, that the landed intereſt of the papiſts will be leſſened ſhould they thus alien; which is a very odd way of putting people into eſtates, in order to get them out afterwards. Our interpretation ſupports the intention of the act, inaſmuch as it plainly diſcourages parents from ſending their children for education into popiſh ſeminaries; ſince by that they are cut off from their country, and made *quaſi* aliens and outlawed perſons. Their conſtruction is directly contrary to all rules of interpretation obſerved in acts of the ſame nature; and that whether this act be conſidered either as an act made for the advancement of religion, or as an act * made for the ſuppreſſing of public miſchiefs, and promoting the public good. In *Hobart*, 157. we are told, that acts of parliament made for the advancement of religion ſhall, in ſupport of that intention, be ſtretched even beyond the words. Now here the words are plainly with that interpretation that beſt ſupports the intention of the act. In 11. *Co. Rep. fol.* 7. ſeveral inſtances are put of acts of parliament made for the advancement of religion, that have had a large and liberal interpretation put upon them. In *Poulter's Caſe* (*b*), inſtances are given of acts of parliament which, though criminal ones, have yet been extended by equity, becauſe made for ſuppreſſing of public miſchief, and the advancement of the public good. It cannot be doubted but that the act of parliament we are now upon deſerves a large and liberal conſtruction, upon both theſe accounts. Their interpretation is contrary to the rule of the civil law, which is, *In dubio hæc legis conſtructio, quam verba oſtendunt.* And none but lawyers would ever have thought upon a different interpretation

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* [409]

Ante, 358.

Salk. 395.

* [410]

(*a*) Raym. 172. 4. Mod. 101. (*b*) 11. Co. 34.

from

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from that which we put upon it. It is pretended, that their interpretation is made in favour of the heir; but yet by this means the anceſtor is enabled to alien, and ſo diſinherit the heir; which, if a proteſtant, he will moſt certainly do. But it will be demanded of us, Where is the eſtate during the life of the perſons thus diſabled? Here I anſwer, in the firſt place, that moſt certainly it ſhall not be in the perſon diſabled, if there is a poſſibility that it may be elſewhere, *Maledicta expoſitio quæ corrumpit textum.* It is a rule in the interpretation of ſtatutes, that whatever is a neceſſary and
* [411] unavoidable conſequence * of an act of parliament, is as much a part of that act as if inſerted *totidem verbis* in the act (*a*). There is another rule to be obſerved in interpreting acts of parliament, *viz.* That where any point is plainly and directly enacted, ſuch an interpretation muſt be held as to render the plain deſign of the act practicable, notwithſtanding the rules of common law ſhould be hereby overthrown; for it is the proper buſineſs of acts of parliament to make alterations in the common law. Though at the ſame time it muſt be acknowledged, that an act of parliament ought to be interpreted by the rules of common law, as far as is conſiſtent with the preſerving the end and deſign of the act. In the next place I anſwer, that if the land never veſted in the party himſelf, as we ſay it did not, the king cannot have it (*b*). In the third place I anſwer, it cannot go to the iſſue of the perſon diſabled, according to that maxim of law, *Non eſt hæres viventis.* Therefore it muſt neceſſarily go to him in reverſion; as in caſe of an eſtate-tail, upon failure of iſſue it reverts to the donor and his iſſue; or in caſe of a fee-ſimple, it ſhall eſcheat to the lord and his heirs, of whom the land is held. But it is objected, if the land is to go over to him in reverſion, how can the anceſtor have it back again in caſe he conforms, as it is plainly provided by the act that he ſhall? To this it may be ſaid, that the meaning of that clauſe in the act is not, that upon conformity he ſhall have back what is gone over and veſted in another, but that the incapacity being removed by his conformity, he ſhall, from the time he ſo conforms, be capable of inheriting whatever ſhall fall to him in a courſe of deſcent, as if he had never been diſabled. But ſuppoſing, for the encouraging of conformity, that the act ſhould look backwards,
* [412] and give him that * inheritance which would have veſted in him but for this incapacity now removed; is it ſtrange or difficult to conceive, that an act of parliament may do it? If an act of parliament repealing an act of parliament be repealed, the firſt act is conſequently ſet up again. It appears from the *caſe of the Prince of Wales* (*c*), that for a ſtate of inheritance to veſt and reveſt is not a new thing upon an act of parliament. It is ſaid (*d*), that an act of parliament can create an eſtate-tail without a donor; and when we ſee eſtates limited for a particular purpoſe, we are not to meaſure the validity of ſuch limitations by the ſtrict rules

(*a*) Hob. 293. Bro. Abr. "Corone," 204.
(*b*) Co. Lit. 13.
(*c*) 8. Co. 32.
(*d*) Raym. 355.

of

of the common law; for the parliament can control the rules of common law (*a*). It can make an eſtate of freehold to ceaſe, as if the party were dead; as in caſe of a parſon who accepts a ſecond benefice, contrary to the ſtatute of 21. *Hen.* 8. of Pluralities (*b*). And for this cauſe *Lord Hobart* ſays (*c*), "that judges have autho-"rity to mould ſtatute-laws according to reaſon and beſt conve-"nience, to the trueſt and beſt uſe;" eſpecially conſidering, that the parliament proceeds many times according to natural equity, *ſecundum æquum et bonum*, which is *lex legum*, without reſpect to legal ceremonies (*d*). So that where the drift and ſole intent of an act of parliament is moſt plainly diſcerned, as in this caſe, and yet that intention cannot be obſerved, were the ſame in a deed, by conſtruction according to the rules of law, we ought rather to preſume, that the parliament, in whoſe power it was ſo to do, reſolved to leap over and waive the mechanical rules of law, and to make a particular law for that occaſion. *Beaumond's Caſe* (*e*) is put by *Hobart* thus: *John Beaumond* and his wife being ſeiſed in ſpecial tail, remainder to *John Beaumond* in fee, he alone levied a fine to *Edward the Sixth* in fee, which eſtate came to the *Earl of Huntington* in fee; *Beaumond* having iſſue died; * his * [413] wife entered; the *Earl of Huntington* confirmed the eſtate in the wife, *habendum* to her and the heirs of the body of her and her huſband: and it was ruled, that the confirmation wrought nothing, becauſe ſhe had as great an eſtate before; and alſo the iſſues could not be made inheritable, which were before barred by their father's fine, and the eſtate-tail as againſt them lawfully given to another. And it was further reſolved, by way of admittance, that if that remainder in fee had not been to *Beaumond* himſelf, but to a ſtranger, the entry of the wife had reſtored that remainder to the ſtranger, and had left nothing in the conuſee but a mere poſſibility; ſo ſhe hath the tail not only for herſelf, but to the benefit of other eſtates growing out of the ſame root with his; and yet during the life of *Beaumond*, the entail had been barred, and all had been in the conuſee, and the wife had had nothing but a poſſibility *vice verſa*. And upon this caſe *Hobart* obſerves, that an eſtate-tail may ceaſe for a time, and riſe again, and he in reverſion may enter during the ceſſer of the eſtate-tail. In *Littleton* (*f*) there are caſes put where, by the common law, both freehold and eſtates-tail ſhall be in abeyance, *viz. in nubibus*, in conſideration only of law, for a time, or, in other words, ſhall ceaſe for a time. If a tenant in tail grant "all his eſtate" to another; *quoad* his iſſue, this works no diſ-continuance; but *quoad* himſelf, the reverſion is in abeyance, for he ſhall have none left in him againſt his own grant (*g*). If tenant in tail of lands holden of the king be attainted of felony, and the king after office ſeizeth the ſame, the eſtate-tail is in abey-ance (*h*). If a leſſee for life become profeſſed, there ſhall be no

Thomas against Fleetwood.

Ante, 36a.

(*a*) 13. Co. 64.
(*b*) 6. Co. 40.
(*c*) Hob. 346.
(*d*) Hob. 224.
(*e*) Hob. 257. and reported 9. Co. 140.
(*f*) Co. Lit. ſect. 646, 647. 649, 650.
(*g*) Litt. ſect. 613.
(*h*) Co. Lit. 345. a.

occupancy,

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occupancy, but the leſſor may enter, for he is dead in law; but upon his deraignment, the leſſee may re-enter * upon the leſſor, to whom the land went during his profeſſion (*a*). If a tenant in tail die (his wife *enſient* with a ſon) without iſſue, the donor may enter; but upon the birth of the ſon, the eſtate-tail is ſet up again (*b*). As in that caſe, the expectation of the birth of a ſon did not prevent the going of the eſtate to the donor; ſo by parity of reaſon, the expectation of conformity in our caſe will not hinder the eſtate from going over to him in reverſion. In caſe of a fee-ſimple, where the uncle enters before the birth of a child, that after-born child is not entitled to the meſne profits. In like manner in the ſpiritual court, in caſe of a divorce *à vinculo matrimonii* the huſband is not anſwerable for the meſne profit of his wife's eſtate. But the life of *Philip* is objected to us; and we are told, that he in reverſion can never enter while there is iſſue of the tenant in tail alive. To this I anſwer, that the ground upon which this objection is founded is much too large; for according to *Hobart* (*c*), 345, 346. and *Sir Nicholas Carew's Caſe* (*d*) is quoted for it, it is not enough to keep out the reverſioner, that there is iſſue, unleſs this iſſue be heir; as in caſe of the attainder of the anceſtor. Now *Philip*, though he is iſſue, yet is not ſuch an iſſue as can inherit; and therefore is no more an heir in tail than a man can be ſaid to be heir in the life-time of the father. Nay, it is not enough that there be iſſue, or an heir of the body; nay, and that he may poſſibly inherit; but he muſt be then inheritable, or elſe it will go to the reverſioner. If lands be given to a man, and the heirs male of his body, and the man has iſſue a daughter, who has iſſue a ſon, here this ſon is both iſſue and heir, and yet is not inheritable, becauſe
*[415] his * title muſt be conveyed through all males; therefore the reverſioner muſt have the lands (*e*). Where a perſon is incapacitated to take by deſcent, becauſe he is attainted, or an alien, or a monk, if this incapacity be taken off, by pardon, by naturalization, deraignment, he ſhall have the land; but yet the poſſibility that this incapacity might be removed, at the time when the deſcent happened, cannot hinder the reverſioner from entering; ſo neither can the poſſibility of conformity hinder the reverſioner from entering in our caſe.

Afterwards this caſe went up to the houſe of lords, and in the printed caſe delivered by the defendant, the ſtrength of the objection ariſing from the life of *Philip*, who by the ſpecial verdict was not found to be without iſſue, is thus expreſſed: "Unleſs it appear that there "is a good title in the leſſor of the plaintiff, the plaintiff cannot "recover, whether the defendants have any title or not; for the "plaintiff muſt always recover by the ſtrength of his own title, "not the weakneſs of the defendant's. It ſeems very ſtrange, and "repugnant to all the rules of law, that there being an eſtate-tail

(*a*) 2. Roll. Abr. 150.
(*b*) Bedford's Caſe, 7. Co. 8.
(*c*) Hob. 345, 346.
(*d*)
(*e*) Co. Lit. 24, 25.

"created

" created to the heirs males of the body of *Thomas* firſt *Lord* " *Gerrard*, and there being iſſue of that entail yet in being, who " may alſo have iſſue male, the *Ducheſs of Hamilton* ſhould claim " by virtue of the remainder to the right heirs of CHARLES *Lord* " *Gerrard*, who ſettled the eſtate, while that eſtate-tail hath a " continuance; her remainder being to take place upon the death " of *Lord Thomas* and all his iſſue male. And it ſeems ſtill more " difficult for her to do this under an act of parliament, which is " ſo far from giving anything to her, that it expreſsly preſerves the " right of the offender's poſterity (which is endeavoured to be " prevented and deſtroyed by her), and that in the very clauſe that " lays the diſability upon the anceſtor. * And although there be * [416] " a preſent diſability in *Philip*, yet it is but perſonal; and the " eſtate-tail muſt continue in him, for the benefit of the iſſue, " which, admitting he had none, he ſtill may have."

THORNEY *againſt* FLEETWOOD.

TRINITY TERM,

The Fourth of George the Firſt,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

Willis *againſt* Lucas.

Caſe 207.

If a teſtator deviſe his land to his youngeſt ſon, he or his heirs paying 10l. a-year to his other children during his life, and after the death of the youngeſt ſon and his wife, then to the children of ſuch youngeſt ſon, the wife, on the death of her huſband, ſhall take an eſtate for life by implication; for the teſtator, by giving an annuity to his other children, meant to exclude the heir at law.

J. S. had three ſons, *A. B. C.* and daughters; and being ſeiſed in fee of land, part whereof was gavel-kind, deviſed it by his will to *C.* his youngeſt ſon, he or his heirs paying ten pounds a-year to *A.* ten pounds a-year to *B.* ſo much a year to the daughters, &c. for the term of his life; and after the death of *C.* and his wife, then it was to go to the ſons and daughters of *C.* according as he ſhould have one or other, equally to be divided between them.

C. dies, living his wife; his wife enters, as conceiving it a deviſe by implication to her for her life. The heir at law, ſuppoſing the land not at all diſpoſed of by the will, during the intervening time between the death of *C.* and the death of his wife, and that it ought, therefore, in the interim, to deſcend to him, brought his ejectment at common law; but the wife protecting her eſtate by mortgage, nonſuited him.

He therefore now brought his bill to diſcover theſe incumbrances, and whether they were not ſatisfied.

The wife in her anſwer inſiſts, in the firſt place, that this is a deviſe to her by implication for life: and ſecondly, that though, by the rigorous rules of law, this ſhould not be ſo, yet that this eſtate being her chief dependance, and her father-in-law having often told her before the making of his will that he would give it her for life, and having likewiſe after the making the will declared that he had done ſo, ſhe hopes the plaintiff ſhall not have the aid of a court of equity to get that from her which her father-in-law ſo plainly deſigned to give her.

S. C. 1. Peer. Wms. 472. S. C. 2. Eq. Ab. 343. 363.

WILLIS *againſt* LUCAS.

FOR THE PLAINTIFF. * The difference taken in the Year-Book 13. *Hen.* 7. and 2. *Cro.* 75. as to eſtates by implication, *viz.* that where the eſtate is deviſed after the death of the wife to the heir at law, there the wife ſhall take by implication; but not where the deviſe is over to a ſtranger; was inſiſted ſtrongly upon in favour of the plaintiff. As alſo the rule laid down in the caſe of *Gardiner v. Sheldon* (*a*), that an eſtate ſhould never be raiſed by implication, unleſs where it was a neceſſary and unavoidable one.

2. Vern. 572.

IT WAS URGED *in favour of the wife*, that by a neceſſary implication, in the meaning of the law, was not to be underſtood a natural neceſſity that the eſtate could go no where elſe, but a neceſſity ariſing from the plain intention of the teſtator in his will. It was alſo urged, that the heir at law, by having ten pounds a-year given him, when by law he was entitled to the whole, was evidently, by the intention of the teſtator, as much excluded from having the land deſcend to him in the mean time as if the deviſe had been to him after the death of *C.* and his wife; that if the land ſhould deſcend to the heir at law, it would not in him be ſubject to the payment of the annuities, which would be plainly contrary to the intention of the teſtator. It was alſo inſiſted upon, that part of theſe lands being in *Kent* muſt be taken to be in the nature of gavelkind, and then all the ſons and their repreſentatives make but one heir, in which caſe the deſcent muſt be entire: but this cannot be; becauſe as to a third of the land, the repreſentative of *C.* being heir at law, and the perſon to whom the deviſe is made, it will be a deviſe of that by implication to the wife, according even to the rule inſiſted upon by the other ſide. * Then there remains two-thirds to deſcend, which will be a deſcent neither by cuſtom, nor by the common law: not by the cuſtom, for that is already broken in upon by the eſtate by implication raiſed by the will; not by the common law, for theſe two-thirds muſt go to the two ſons, or their repreſentatives, and the repreſentative of *C.* And here again the wife muſt have, by virtue of their own rule, an eſtate by implication in the third part of the two-thirds; becauſe the deviſe is to the repreſentative of *C.* heir at law, according to this way of taking it, of a third part of the two-thirds.

*[418]

PARKER, *Lord Chancellor*, was of opinion, that the wife ought to have an eſtate for life by implication, the heir at law being excluded by the annuity.

But this being matter triable at law, he directed an iſſue accordingly, where the wife was ordered to waive her incumbrances, and inſiſt only on her title at law.

No regard to be had to parol declarations in a deviſe of land.—2. Vern. 98. 337. 339. 624, 625.

Parol evidence was offered to prove the intention of the teſtator to give it his wife; but the chancellor refuſed to receive it.

(*a*) 1. Eq. Abr. 197. Vaugh. 259. 2. Keb. 781. 1. Freem. 11.

MICHAELMAS

MICHAELMAS TERM,

The Fifth of George the Firſt,

IN

The Court of Chancery,

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

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* Marks *againſt* Marks. Caſe 208.

THE TESTATOR by his will, bearing date on the twelfth day of *April* 1697, deviſed land to his wife *Anne* for life, remainder to his ſecond ſon *Daniel* in fee; provided and nevertheleſs, that if his third ſon *Nathaniel* ſhould, within three months after the death of the wife, pay the ſum of five hundred pounds to *Daniel*, his executors or adminiſtrators, then he deviſed it to *Nathaniel* and his heirs.

Nathaniel died in the life-time of the wife; afterwards the wife died, and *Daniel* entered.

The queſtion was, Whether the heir of *Nathaniel* ſhould be allowed to perform the condition, by payment of the money, and ſo be let into the land?

The reaſon why this, being a point purely at law, came to be ſpoken to in a court of equity, was, that by reaſon of marriage-ſettlements, meſne incumbrances, &c. it became uncertain to whom the heir of *Nathaniel* (admitting by law he might perform the condition) was to make the tender: and therefore he brought his bill in equity for relief and direction; which bill was filed within the three months limited for the performance of the condition.

If *A.* deviſe land to *B.* for life, with remainder to *C.* in fee, provided, that if *D.* pay 500l. to *C.* his executors or adminiſtrators, within three months after the death of *B.* that then *D.* and his heirs ſhall have the land, and *D.* die in the life-time of *B.* yet if the heir of *D.* pay the 500l. to *C.* within the three months after the death of *B.* he ſhall have the eſtate.

*This Term PARKER, *Lord Chancellor*, aſſiſted by SIR JOSEPH JEKYLL, decreed in favour of the plaintiff.

S. C. 1. Eq. Ab. 106. S. C. Prec. Ch. 486. S. C. 1. Stra. 129. 1. Atk. 394. Feam. 303. 317.

SIR JOSEPH JEKYLL ſpoke firſt to the following effect: The queſtion at law to be reſolved in this caſe, before any decree can be made, is, Whether the plaintiff, as heir of *Nathaniel*, can

MARKE *against* MARKE.

enter upon the eſtate upon payment or tender of the money? I am of opinion that he may; and that this is an act not perſonal to *Nathaniel*, but what may be performed by the heir. If this had been a condition, the law had been plainly ſo. So is *Litt. ſect.* 334. Feoffment upon condition, that the feoffor ſhall pay ſuch a ſum at ſuch a day, &c.; feoffor dies before the day, &c. yet the heir, though not mentioned, may tender, &c. Nay held, *ſect.* 336. that a ſecond feoffee, who has only a privity of eſtate, may do it. But this is not the caſe of a condition, but of an executory deviſe. In the caſe of a condition, the heir has a right antecedent to the performance of the condition; and he does not gain a new eſtate, but reveſts an old one by the performance of the condition. *Cujus contrarium verum* here; for upon performance of the condition, the payment of the money (to ſpeak in the language of the law), a new created eſtate veſts in the heir. *Co. Lit.* 219. *b.* LORD COKE's words are theſe, "That a condition which is to create an eſtate is "to be performed, by conſtruction of law, as near the condition "as may be, and according to the intent and meaning of the con- "dition, albeit the letter and words of the condition cannot be "performed." The caſe before us is a caſe upon a will, where the law has ever allowed the greateſt latitude of conſtruction in ſupport of the intention of the teſtator. Nobody can doubt but that the intention of the teſtator was to give the land to *Daniel* only in the nature of a ſecurity for five hundred pounds, and that *Nathaniel* was to have the fee-ſimple. * I am of opinion, *Nathaniel* had ſuch a future intereſt or poſſibility in the inheritance as might deſcend to the heir, though it never veſted in the anceſtor. *Lampet's Caſe* (*a*) is an expreſs authority, that a future intereſt in a term ſhall go to the executor; and it ſeems to me to fall in with the reaſon of that caſe, that a future intereſt in an eſtate of inheritance ſhould deſcend to the heir. Before the ſtatute *de Donis*, the donor had but a poſſibility, barrable after iſſue, at the pleaſure of the donee; but yet this poſſibility was deſcendible to the heir (*b*). A caſe is put (*c*), where the heir ſhall be in by deſcent of an eſtate, which could never veſt in the anceſtor during his life. Land given to *A.* and *B.* ſo long as they live jointly together, the remainder to the right heirs of him that dieth firſt; *A.* dies, the heir of *A.* ſhall have the land by deſcent; and yet the remainder did not veſt during the life of *A.* for the death of *A.* muſt precede the remainder. In the caſe of *Oates v. Frith* (*d*) it is ſaid, that the heir is in repreſentation in point of taking by inheritance *eadem perſona cum anteceſſore*. That the law is the ſame in caſe of an act executed by way of uſe is plain, from the third point in *Shelley's Caſe* (*e*). And the rule there laid down is applicable here, *viz.* that the heir ſhall be in by deſcent, where the land might poſſibly have veſted in the anceſtor. The caſe of *Spring v. Cæſar* (*f*) is a ſtrong caſe to prove, that in a conveyance by way of

* [421]

(*a*) 10. Co. 46.
(*b*) 2. Inſt. 335.
(*c*) Co. Lit. 378.
(*d*) Hob. 130.
(*e*) 1. Co. 98. a.
(*f*) 1. Roll. Abr. 420. 469.

uſe

life the heir may pay the money, if the anceſtor died before the day. As to the caſe of *Bret* v. *Rigden* (*a*), that is not applicable to this caſe. For there was no complete deviſe; becauſe the anceſtor to whom the deviſe was made dying in the life-time of the deviſor, there was no deviſee at the time when the will was to take effect: but here there * is a complete deviſe, and of ſuch an intereſt or poſſibility as might have veſted in the anceſtor. But it is objected, that the heir has his election whether he will pay the money or not. True; but as this election is in favour of the heir, it ought not to be turned to his prejudice. The four reaſons given by *Lord Coke*, in his *Commentary upon Littleton* (*b*), are all applicable to the caſe in queſtion; I am therefore of opinion, that the heir may pay the money, and ſhall take the land as an executory deviſe, and by way of deſcent. And though before the caſe of *Lloyd* v. *Carew* (*c*) it ſeems to have obtained for law, that no executory deviſe of a fee upon a fee ſhould be allowed of, unleſs upon a contingency to happen during the life of one or more perſons in being at the time of the ſettlement; and conſequently the limitation to *Nathaniel* would have been void, becauſe dependant upon a contingency to happen within three months after the death of the wife; yet ſince that caſe, which went through the houſe of lords, and is reported *Show. Caſes in Parliament*, 137. the law is now ſettled, that in caſe of a contingency that cannot in the nature of it precede the death of a perſon, a reaſonable time may be allowed ſubſequent to the deceaſe of that perſon for performance of the condition; and a fee limited thereupon is good. In that caſe, a year was held no unreaſonable time; *à fortiori* not three months, which is the preſent caſe. The plaintiff has good equity to be directed and indemnified in the payment.

Mant *againſt* Mant.

* [422]

PARKER, *Lord Chancellor*. I am of the ſame opinion with the MASTER OF THE ROLLS; and in what view ſoever I conſider the preſent queſtion am the more confirmed in it. Though the words of the will are only, "that *Nathaniel* ſhould pay," and not *Nathaniel* and his heirs, yet this is only a plain miſtake in the will, which is a conveyance that the law ſuppoſes to be made when a man * is *inops conſilii*, and therefore allows great favour to be uſed in its conſtruction. The plain intention of the teſtator was to provide for his children; to the one he intended to give five hundred pounds, to the other the land. At common law, if *A.* had made a feoffment to *B.* for life, remainder to *C.* in fee, upon condition, that if *B.* ſhould pay ſo much money to *C.* that then *A.* ſhould have the land; *A.* has a right to take advantage of the performance of the condition, which right veſts in *A.* the anceſtor, and is in its own nature deſcendible to the heir, but not aſſignable. If *Marks* the teſtator had made a feoffment to *Daniel*, upon condition, that if the teſtator ſhould pay ſo much money to *Daniel*, then *Nathaniel* ſhould have fee; this is a condition, the right of

Ante, 419.

* [423]

(*a*) Plowd. 341.
(*b*) Litt. ſect. 334.
(*c*) 1. Eq. Abr. 260. Prec. Ch. 106. Show. P. C. 137.

MARKS against MARKS.

performing which deſcends to the heir of the teſtator, and the heir would be at liberty to take advantage of it; for the limitation of the fee over to *Nathaniel* would be void, by a particular maxim of the common law, which will not allow a fee to be limited upon a fee (*a*); or by that other maxim, which excludes a ſtranger from taking advantage of a condition. Since the ſtatute of Wills (*b*) and ſtatute of Uſes (*c*) executory deviſes and ſpringing uſes have been allowed of. Theſe were firſt allowed of with reſpect to the teſtator or party himſelf; afterwards it came to be allowed of to other perſons. And therefore at this day, in deviſes and limitations of uſes, an eſtate may be limited over to a third perſon, upon the defeaſance of a former eſtate in fee, if the condition be not too remote in point of time. And though there have been words found out to ſave, in appearance, the maxims of the common law; yet in effect and in truth, the very benefit and advantage of the condition is paſſed over to a third perſon, notwithſtanding the maxim of law, that a ſtranger cannot take advantage of a condition.

[424] * In this will the caſe is nothing but this: The teſtator gives the land to *Daniel*, redeemable upon the payment of five hundred pounds; and he gives the equity of redemption to *Nathaniel*: *Nathaniel*, therefore, ſeems to me to have an equity of redemption that remains open to him in a court of equity as well after the time limited as before. Indeed, there might have been a difference between this caſe and the caſe of a common mortgage (where, though when the day is paſt, and ſo the legal eſtate is abſolutely veſted in the mortgagee, yet in equity a right to redeem remains) had *Nathaniel* been here to come for relief againſt the heir at law: but this is not the caſe; for he comes for relief againſt a third perſon, who had the eſtate veſted in him for no other purpoſe but to make the eſtate redeemable. The queſtion that remains is, Whether this advantage be not loſt by the death of *Nathaniel* before the day? which imports theſe two objections: FIRST, That the payment of this five hundred pounds is perſonal to *Nathaniel*; and therefore not to be performed by anybody elſe. SECONDLY, That the contingency ſhould have happened in the life-time of the anceſtor; for the heir is not to take by purchaſe, but by deſcent.

As to the firſt point; I am of opinion, that this is an act not perſonal to *Nathaniel*. Payment of a ſmall trifling ſum may be conſidered rather as a ceremony than a valuable conſideration; and this I take to be the ground upon which the two Judges went, who, in the caſe of *Spring v. Cæſar* (*d*), held the payment of the ten ſhillings to be a perſonal act; for when the ſum comes to be conſiderable, as here it is five hundred pounds, the payment of it is never eſteemed a perſonal act: and this appears throughout

[425] *Engleſield's Caſe* (*e*). * The ſection of *Littleton* (*f*) ſo often

(*a*) But ſee Carpenter *v.* Smith, Pollexf. 78. and 2. Fonblanque's Treatiſe of Equity, 46.

(*b*) 32. *Hen.* 8. c. 1. and 34 *Hen.* 8. c. 5.

(*c*) 27. *Hen*, 8. c. 10.

(*d*) 1. Jones, 389. Winch. 103. 116. 118.

(*e*) 7. Co.

(*f*) Lit. ſect. 334.

quoted

quoted is an expreſs authority that this is not a perſonal act. So that I am of opinion, that if the heir pays, the anceſtor does, to all intents and purpoſes of this will, pay in him who is his repreſentative.

MARRE *againſt* MARRE.

As to the ſecond point, that the heir muſt take by deſcent, and not by purchaſe; I am of opinion, that he does take by deſcent, or in nature of deſcent. In *Wood's Caſe*, quoted 1. *Rep.* 99. *a.* it is held, that the heir ſhall be adjudged to take in courſe and nature of a deſcent, where neither right, title, nor action, but only a uſe of poſſibility deſcended, that might, upon the performance of the condition, have veſted in the anceſtor, and then the heir would have claimed by deſcent. And it is laid down as a rule in *Shelley's Caſe*, that where the heir takes anything that might have veſted in the anceſtor, there, although it firſt veſted in the heir, and never in the anceſtor, yet the heir ſhall be eſteemed in by deſcent. Here is a right to the performance of this condition veſted in the anceſtor, a right by which the eſtate might poſſibly have veſted in the anceſtor, a right that might have been releaſed by the anceſtor, but not being releaſed deſcends to the heir; and therefore the heir may be properly ſaid to be in by deſcent, ſince the right to perform the condition, of which the veſting of the land is but a conſequence, does deſcend to him. The caſe of the feoffment in the ſection of *Littleton* is parallel in all reſpects to the preſent caſe; paralliel as to the condition, as to the performance, as to the effect of the performance, and differs only as to the perſon who is to take advantage of the performance of it. And this is ſupplied by the ſtatute of Wills, which gives the third perſon as good a title to take advantage of it as the feoffor had by the common law.

* [426]

* Wilſon *againſt* Fielding.

Caſe 209.

THE TESTATOR mortgaged his land for ſuch a ſum of money, and gave a bond for the performance of covenants comprised in the mortgage-deed, and died indebted to ſeveral perſons by ſimple contract. The mortgagee got a judgment upon this bond; and the executor paid a great part of this judgment out of the perſonal eſtate, by which means the aſſets proved inſufficient to diſcharge the debts by ſimple contract.

If a perſon, being indebted by ſimple contract, mortgage his land, and give a bond for performing the covenants in the mortgage deed, and die, and, on judgment obtained, the executor pays the bond, a court of equity, if there are not otherwiſe ſufficient aſſets, will oblige the heir to refund the ſum ſo paid for the benefit of all the creditors, without diſtinction, in proportion to their reſpective debts; and therefore a ſimple-contract creditor, who has obtained a judgment ſubſequent to the teſtator's death, cannot, in equity, claim a preference to the reſt of the creditors, with reſpect to the ſum ſo refunded.—3. C. 1. Tab. abr. 143. 3. C. 2. Vern. 783. 2. Vern. 200. 281.

A bill was therefore brought by the creditors againſt the heir, to oblige him to refund, out of what he had been eaſed in reſpect to the land deſcended to him, by the diſcharge of a great part of the mortgage-debt out of the perſonal eſtate, as far as was neceſſary for the diſcharge of debts. And it was decreed accordingly that he ſhould refund.

One

WILSON against FIELDING.

One of the creditors by ſimple contract had, after the death of the teſtator, by ſuit at law againſt the executor, turned his ſimple contract debt into a judgment debt.

And THE QUESTION was, Whether the money ſo decreed to be refunded, and which was called equitable aſſets, becauſe it could not have been aſſets at all without the aſſiſtance of a court of equity, ſhould be decreed to be refunded for the benefit of all the creditors equally; or for the advantage, in the firſt place, of him that had turned his debt into a judgment debt? The executor and the reſt of the creditors had offered this judgment creditor to be paid in equal proportion with the reſt; but he refuſed, inſiſting upon his judgment.

IT WAS INSISTED, *in behalf of the reſt of the creditors*, that debts by ſimple contract are in juſtice and conſcience as much debts as debts by bond or judgment: that therefore, according to the rule
* [427] of equity, * "that he who will have equity muſt do equity," if a judgment creditor ſtand in need of the aſſiſtance of a court of equity to make that aſſets which at law would not be aſſets, a court of equity will never give him this aſſiſtance, unleſs he will conſent to come in equally with the reſt of the creditors, who in conſcience and equity have as juſt a demand as himſelf. Thus, if a man by will ſubject his land to the payment of debts, the court of chancery always decrees, that all the creditors, without diſtinguiſhing what the nature of the debts are, whether ſimple contract, bond, or judgment debts, ſhall be paid in equal proportion, out of the land thus ſubjected by will to the payment of debts.

IT WAS URGED *by the Counſel on the other ſide*, that nothing was more common than bills brought for the diſcovery of aſſets; that if it ſhould happen in this caſe, that bonds taken in truſt for the teſtator ſhould be diſcovered, it was never yet heard of, that a creditor ſhould be told in this court, "Theſe bonds are aſſets in equity, and you ſhall not have the aſſiſtance of this court to make them aſſets in law, unleſs you will quit the advantage the law gives you, waive the ſuperiority of your debt, and be content to ſtand upon a level with the reſt of the creditors."

PARKER, *Lord Chancellor*. The doctrine that ſeems to be laid down by the Counſel for the creditors, that there is this ſtanding difference between *aſſets in law* and *aſſets in equity*, that though the former ſhall go according to the courſe of adminiſtration preſcribed by the law, yet the latter ſhall, without any regard to this, go among the creditors equally, however different the nature of their debts are, is a doctrine without any reaſon or foundation; and would eſtabliſh a rule in equity directly contrary to the known rules of law, as to the order in which debts are to be
* [428] paid (*a*). * Indeed, as to the caſe put of land deviſed by the teſtator to be ſold for the payment of debts, it is ſo; and this court

(*a*) Contra 2. Vern. 62.

does

Wilson against Fielding.

does always decree the profits ariſing from the ſale equally among all the creditors; but then this land may be conſidered as a gift of the teſtator among all his creditors; and as the teſtator, the donor, has not thought fit to make any diſtinction between his creditors, ſo this court, which is in nature of a truſtee for the teſtator, will make none neither. But, generally ſpeaking, there is no difference between *aſſets in law* and *aſſets in equity*; but both muſt be diſtributed by the executor in a courſe of adminiſtration. Had therefore this judgment creditor been in poſſeſſion of his judgment at the time of the death of the teſtator, I would not have taken the benefit of his judgment from him, but would have decreed the refunding for his benefit in the firſt place. But this is not the caſe; this judgment is obtained againſt the executor, and whether voluntarily does not appear, and it will be impoſſible for me to diſtinguiſh; it is enough that it may be voluntarily confeſſed by the executor, who has it by this means in his power to give a preference to a ſimple contract creditor, at any time, before a bond creditor, and ſo in reality overturn the courſe of adminiſtration. And though this at law may be done, ſo that had payment been made to this judgment creditor, there had been no remedy; yet a court of equity ſhall never be aſſiſting to the enabling of an executor to the doing of it.

The money was therefore DECREED to be refunded for the equal benefit of all the creditors.

HILARY

HILARY TERM,

The Fifth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*

Nicholas Lechmere, *Eſq. Attorney General.*
Sir William Thompſon, *Knt. Solicitor General.*

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* The King *againſt* Leonard.

Caſe 210.

THE HABEAS CORPUS ACT directs, that if a perſon committed for high treaſon or felony expreſſed in the warrant of his commitment, ſhall make his prayer and petition in open court, the firſt week of the Term or day of the ſeſſions, to be brought to his trial, and ſhall not be indicted in the next Term or ſeſſions after ſuch commitment, he ſhall be bailed, &c.

Perſons committed by *rule of court* cannot petition under the *Habeas Corpus* Act to be bailed.

S. C. 1. Stra. 142.

Now it was doubted, Whether perſons committed by rule of Court are intitled to the benefit of this act?

And it was reſolved by two Judges, *viz.* EYRE and FORTESCUE (*abſente* POWYS, *diſſentiente* PRATT, *Chief Juſtice*), that none are entitled to make their prayer but ſuch as are committed by a warrant of a *juſtice of peace* or *ſecretary of ſtate*, and not thoſe committed by *rule of court*; for that is not, in the meaning of the act of parliament, a commitment by warrant (*a*).

(*a*) The defendant was committed in Trinity Vacation by a warrant from the ſecretary of ſtate for high treaſon, and lay in priſon until the laſt day of Michaelmas Term, when he was brought into the court of king's bench, charged with an indictment, and re-committed by rule of court. During the firſt week of Hilary Term, he applied to enter his prayer upon the Habeas Corpus Act: but it was refuſed, S. C. 1. Stra. 142.

EASTER

EASTER TERM,

The Fifth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Nicholas Lechmere, *Eſq. Attorney General.*
Sir William Thompſon, *Knt. Solicitor General.*

*The King *againſt* The Pariſh of Burcleer.'

Caſe 211.

A copyhold eſtate of 20s. *per annum* enjoyed by a *certificate-man* in right of his wife, during her life, will make a ſettlement, notwithſtanding 9. & 10. *Will.* 3. c. 11.

BY THE STATUTE of 9. & 10. *Will.* 3. c. 11. it is enacted, "That no perſon coming into a pariſh by certificate ſhall have a legal ſettlement in the pariſh, unleſs he ſhall *bona fide* take a leaſe of a tenement of ten pounds a-year, or ſhall be legally placed in, or execute ſome annual office in ſuch pariſh."

It was in this caſe debated, Whether a certificate-man who enjoyed a copyhold of twenty ſhillings a-year value in right of his wife, during her life, which laſted five years after the deſcent of the copyhold upon her (*a*), did thereby gain a ſettlement, the ſtatute

S. C. 1. Stra. 163. S. C. Sett. & Rem. 88. S. C. Shaw. P. L. 224.

(*a*) It is ſaid, that this eſtate did not *deſcend* to the wife of the certificate-man, but was *ſurrendered* to her by her father, Bott's P. L. 2 vol. 685. *notis*; but even in this caſe, if made in conſideration of natural affection, it is a *voluntary ſettlement*, Rex *v.* Marwood, Burr. S. C. 386. Rex *v.* Ingleton, Burr. S. C. 560.; and not a *purchaſe* within the 9. *Geo.* 1. c. 7. ſ. 7. which enacts, that no perſon ſhall gain a ſettlement by virtue of the purchaſe of any eſtate, unleſs the conſideration amount is thirty pounds *bona fide* paid, &c. See Bott's P. L. 2 vol. 623.

being

THE KING *againſt* THE PARISH OF BURCLEER.

being expreſs, that a certificate-man ſhall not gain a ſettlement unleſs by two ways, of which this is none.

THE COURT reſolved, that this is a ſettlement. For by the preamble of this act it is plain, that the meaning of it was to hinder and debar certificate-men from gaining ſettlements by ſome act purſuant and conſequential of the certificate; as that the certificate * ſhould not amount to a notice in writing, and ſo fall within the ſtatute of 1. *Jac.* 2. c. 17, &c. This conſtruction was parallel to that which had been made upon the ſtatute of 13. & 14. *Car.* 2. c. 12. which enacts, "That any poor perſon coming to "ſettle on a tenement under ten pounds, is removable by two "juſtices within forty days after his coming;" and yet it is reſolved, that a perſon coming to reſide upon his own eſtate, though under ten pounds, is not within the ſtatute, nor removable within the forty days; for that neither this, nor any other act of parliament, deſigned to debar a man from coming to look after and improve his own eſtate; and whenever a perſon comes to his own eſtate, that ſuch a perſon is unremovable, *i. e.* ſettled (*a*).

* [431]

(*a*) The law of this caſe is confirmed, Rex *v.* Stansfield, Burr. S. C 205.; Rex *v.* Cold Aſhton, Burr. S. C. 444; Rex *v.* Shenſton, Burr. S. C. 468.; Rex *v.* Wooburn, Burr. S. C. 785.; and ſee Mr. Conſt's edition of Bott's Poor Laws, vol. 2. page 681 to 697. where all the caſes on this ſubject are collected.

Caſe 212.

Atkin *againſt* Berwick.

Bankruptcy. Whether goods delivered antecedent to an act of bankruptcy, but accepted ſubſequent, were bound by the bankruptcy.

S. C. Fort. 353. S. C. 1. Stra. 265.

A AND *B.* lived in two very remote parts of the kingdom, and had dealings one with another in the way of trade. *A.* ſent up to *B.* a quantity of goods. *B.* apprehenſive that he ſhould ſoon become a bankrupt, and not thinking it reaſonable that theſe goods ſhould go to the payment of other creditors, delivered a quantity of goods, being the greateſt part of them the very individual goods that he had before received of *A.* into the hands of *C.* for the uſe of *A.* *B.* ſubſequent to the delivery, and precedent to the acceptance of them by *A.* became a bankrupt.

The queſtion was, Whether theſe goods were not ſo abſolutely veſted in *A.* and become his property, by the delivery of them to *C.* for his uſe, as not to be ſubject to the diſpoſal of the commiſſioners of bankruptcy?

And upon this appearing by evidence at the trial to be the caſe, it was ſtated, by the direction of PARKER, *Chief Juſtice*, who tried the cauſe, for the opinion of the Court:

Who all delivered their opinion *ſeriatim* this Term, That the property of the goods was ſo veſted in *A.* by the delivery of the goods

goods to *C.* for the uſe of *A.* that they were not ſubject to the diſpoſal of the commiſſioners of bankruptcy (*a*).

ATKIN *againſt* BRERWICK.

PRATT, *Chief Juſtice*, grounded himſelf pretty much upon the authority of the caſe of *Butler* v. *Baker* (*b*).

FORTESCUE, *Juſtice*, mentioned the argument of *Mr. Juſtice Ventris*, in the caſe of *Thompſon v. Leach* (*c*) (upon the * reaſons of which the judgment in the houſe of lords was given) as a ſtore-houſe of law proper to this head (*d*). * [433]

Caſes quoted in the argument were, 2. *Cro.* 680. 687. 1. *Bulſtrode*, 68. 3. *Cro.* 26. *b. Rolle's Abr.* 32. *pl.* 13. *Yelverton*, 164. *Cro. Jac.* 667. *Dyer*, 49. 2. *Rolle's Rep.* 39. 2. *Leon. fol.* 30. *Clerk's Caſe.*

Judgment for the defendant.

(*a*) Lord Mansfield, in the caſe of Hairman v. Filher, approves of the determination in this caſe; but ſays, the true reaſon of it was, that *B.* refuſed to accept of the goods which *A.* had ſent, and returned them to *C.* on *A.*'s account, Cowp. 117.; for it was a renunciation of the contract by all the parties concerned; and a contract may be reſcinded by the vendor and vendee before the rights of other perſons are concerned, Smith v. Field, 5. Term Rep. 404.; and therefore if an agent buy goods, and deliver them to the vendee's packer, after the vendee has written him a letter to countermand the purchaſe but before ſuch letter is received, theſe goods ſhall reveſt in the vendor, ſo far as to prevent their being attached in the packer's hands by the creditors of the vendee, Salte v. Field, 3. Term Rep. 211. But if, in ſuch caſe, the vendor attaches the goods in the hands of the packer, as the property of the vendee, he thereby elects not to reſcind the contract, and cannot, on the vendee's becoming bankrupt, recover them from the packer in an action of trover, Smith v. Field, 5. Term Rep. 402. So a delivery of goods to a *bona fide* creditor, where it is not a voluntary act on the part of a trader, is valid, Yates v. Groves, 1. F. Vez. Rep. 280. Thompſon v. Freeman, 1. Term Rep. 155. But the delivery of a trader's property by *deed* is an act of bankruptcy, 1. Burr. 467. 2. Burr. 827. 1. Bro. C. C. 199. Dougl. 86. Cowp. 117. 629.

(*b*) 3. Co. 25.

(*c*) Carth. 211. 250. 435. Comb. 438. 468. Comy. 45. 1. Eq. Abr. 278. Holt, 357. 623. 665. 3. Lev. 284. 3. Mod. 296. 301. 12. Mod. 173. 1. Ld. Ray. 313. 2. Salk. 427. 565. 618. 675. 3. Salk. 300. 1. Show. 296. Show. P. C. 150. 2. Vent. 198.

(*d*) See 1 Stra. 167.

EASTER TERM,

The Fifth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

Anonymous. Caſe 213.

A DEFENDANT refuſed to anſwer, and ſtood out all contempts, until an order was made for a ſequeſtration. Motion to have a bill taken *pro confeſſo.*

IT WAS PRAYED, *by the plaintiff's Counſel,* that the bill might be taken *pro confeſſo.*

THE COUNSEL *on the other ſide* objected, that this could not be done; becauſe the ſequeſtration was neither under ſeal, nor executed; and alſo becauſe the plaintiff did not produce the original itſelf, but only a copy of it.

PARKER, *Lord Chancellor.* The laſt objection is certainly a good one. But as for the other, there ſeems to me to be no reaſon for it; for the putting the ſeal to the ſequeſtration, and actually executing it, ſeems to be then only neceſſary, when the plaintiff is not ripe for a decree upon his own bill, but wants ſome diſcovery from the defendant's anſwer upon which the decree may be founded: and therefore the actual executing of a * ſequeſtration, to extort an anſwer of which the plaintiff has no occaſion, ſeems to me very unneceſſary. * [432]

Butler *againſt* Duncomb. Caſe 214.

LAND is by marriage-articles ſettled upon huſband and wife, for term of their lives, and after the death of the longeſt liver of them, then to truſtees for the term of five hundred years; Land ſettled upon huſband and wife for their lives, and the longeſt liver of them, then to truſtees for a term of years, which term was in truſt for raiſing, after the commencement of a term, a portion of 3000l. payable at twenty-one, or marriage; huſband dies, leaving iſſue a daughter, who marries, living the mother. Decreed, that the portion ſhould not be raiſed by ſale or mortgage of the term, living the mother, by reaſon of thoſe words "after the commencement, &c."—S. C. 1. Eq. Abr. 339. S. C. 2. Vern. 760. S. C. 1. Peer. Wms. 448.

BUTLER *againſt* DUNCOMB.

which term is declared to be in truſt for the raiſing, after the commencement of the term, a portion of three thouſand pounds for daughters, payable at the age of twenty-one, or marriage, which ſhould firſt happen; remainder to iſſue in tail-male, &c.; huſband dies, leaving iſſue a daughter, and no ſon; the daughter married during the life of the mother.

The daughter and her huſband bring their bill to have the portion raiſed immediately by ſale or mortgage of the term, during the life of the mother.

It was inſiſted upon, that caſes had very frequently happened in this court where, in favour of proviſion for children, terms had been ſold in the life of the parents, by the decree of this court; which ſeems the more reaſonable here, becauſe it is made expreſsly payable at the age of twenty-one or day of marriage, which ſhould firſt happen; which words ſeem to be uſeleſs, as the caſe has now fallen out, the daughter marrying before the death of the mother, unleſs the portion might be raiſed by ſale or mortgage of the future term.

* [434] *PARKER, *Lord Chancellor*, decreed, upon great deliberation of the caſe, that the daughter, when married, had a preſent right or intereſt veſted in her that ſhould deſcend to her executors or adminiſtrators; but that it was a right to a portion to be raiſed after the commencement of a term that could not take place until after the death of the mother.

The reaſons of his reſolution were, that he did not much approve of ſelling of future terms, during the life of both or either of the parents; and was it *res integra* (*a*), he ſhould with great difficulty admit of it. He looked upon the care taken in many ſettlements of late to prevent this as ſo many proteſtations againſt the reaſonableneſs of this ſort of decrees. As for the caſes of this nature, he ſaid, there were ſeveral upon which, if he had time, he could raiſe obſervations pertinent to the preſent queſtion (*b*): but he would only ſay this in general, that there was not one of them that came up to this preſent caſe, which is to have a portion raiſed *before the commencement of a term*, when the ſettlement is expreſs that it is to be raiſed *after the commencement of the term*. In marriage-ſettlements, it is not only to be conſidered what is to be wiſhed, but what the eſtate will bear. That the words "to be "raiſed after the commencement of the term" did import as ſtrongly the negative that it was not to be raiſed before, as the raiſing three thouſand pounds imports that no more ſhall be raiſed.

(*a*) See Gerrard v. Gerrard, 2. Vern. 458. Greaves v. Maddiſon, T. Jones, 201.; and Wingrave v. Palgrave, 1. Peer. Wms. 401.

(*b*) Sandbys v. Sandbys, 1. Peer. Wms. 707. Rearſly v. Newland, 2. Peer. Wms. 93. Ravenhil v. Danſey, 2. Peer. Wms. 179. Brome v. Berkley, 2. Peer. Wms. 484. Hebblethwaite v. Cartwright, C. T. T. 31. Stanley v. Stanley, 1. Atk. 549. Hall v. Carter, 2. Atk. 354. Stevens v. Dethie, 3. Atk. 39. Lyon v. Chandois, 3. Atk. 416. Church v. Harvey, Amb. 335. Smith v. Evans, Amb. 633. Conway v. Conway, 3. Brown C. C. 267.

According

According to this conſtruction, all the words of the ſettlement are ſatisfied: even the words "payable at the age of twenty-one or "day of marriage, &c." are not uſeleſs, even as this caſe has happened; for they ſerve to give the daughter a preſent right and intereſt (which is deſcendible) to a portion, to be raiſed indeed hereafter. * As to the time of the commencement of the term; that is ſo plainly fixed to the death of the mother, as that it will admit of no proof, for want of a clearer medium to prove it by. And though a term may poſſibly, in ſome particular caſes, begin in equity before it does in law, yet certainly it cannot here, where the mother is entitled to the perception of the profits, until the commencement of the term.

* [435]

But THE CHANCELLOR would not give the defendant coſts, becauſe the matter was ſomewhat doubtful (*a*).

(*a*) It appears from the Regiſter's book, that afterwards, on the wife and the truſtees conſenting in court, the huſband was allowed to raiſe fifteen hundred pounds, which was a moiety of the portion, by mortgaging the reverſionary term to ſupply his occaſions in trade, S. C. 1. Peer. Wms. 458. *nota.*

TRINITY TERM,

The Fifth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

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* Trevor *againſt* Trevor.

Caſe 215.

Truſt. Marriage ſettlement.

SIR JOHN TREVOR did by marriage articles oblige himſelf, within two years after his marriage, to ſettle ſuch and ſuch lands to the uſe of himſelf for life, then to the uſe of his wife for life, and then to the uſe of the heirs males of that marriage, and the heirs males of ſuch heirs males. It was alſo covenanted by the articles, that he ſhould ſtand ſeiſed of theſe lands, to the uſes aforeſaid, and ſuch other uſes as ſhould be declared by the truſtees therein named, until ſuch ſettlement ſhould be made. *Sir John Trevor* had iſſue ſeveral ſons by that marriage. He levies a fine of theſe lands, but does not declare to what uſes the fine ſhould be levied; but ſeveral years after, he by deed declares the uſes of the aforeſaid fine in favour of his ſecond ſon, and dies, without ever making any ſettlement purſuant to the articles, and left a very conſiderable eſtate to deſcend upon the eldeſt ſon, not mentioned in the articles.

S. C. 1. Eq. Abr. 387. S. C. 9. Mod. 161. S. C. 1. Peer Wms. 622. S. C. 2. Eq. Abr. 475. 505. S. C. 2. Bro. P. C. 122.

* A bill is brought by the eldeſt ſon to have the fine ſet aſide, and the lands compriſed in the articles, conveyed as therein mentioned.

IT WAS INSISTED *in favour of the defendant*, the ſecond ſon,

FIRST, That in caſe a ſettlement had been literally made according to the articles, then by operation of law, according to *Shelley's Caſe*, an eſtate-tail would have been veſted in *Sir John Trevor*; and conſequently he would have been able to have done what he has now done, *viz.* levied a fine and barred the iſſue.

TREVOR *againſt* TREVOR.

SECONDLY, It was urged, that the covenant to ſtand ſeiſed, &c. was in law a conveyance executed, and did actually veſt an eſtate-tail in *Sir John Trevor*; and conſequently the fine was well levied.

THIRDLY, It was urged, that if in reſpect to thoſe lands agreed by the articles to be ſettled, the eldeſt ſon had any injuſtice done him, ſo as to entitle him to relief in a court of equity, his father had made him an abundant ſatisfaction or compenſation for it, by permitting an eſtate not affected by the articles, and of greater value, to deſcend upon him, when he might have given it from him.

PARKER, *Lord Chancellor*, decreed in favour of the eldeſt ſon (*a*): He ſaid, that this caſe was in effect no more than what was very common in chancery, to decree ſuch a conveyance, as was, though not according to the words of the articles, yet according to the intention of them, by taking care that the huſband ſhould be made only tenant for life, and ſo not have it in his power to defeat the intention of the ſettlement. That the articles were but minutes of the ſettlement; and therefore not neceſſary to be verbally purſued. That what the Court, if applied to, would have decreed, they would ſo far conſider performed, as to ſet aſide the fine.

*[438] * As to THE SECOND POINT, he looked upon the covenant to ſtand ſeiſed, as what was deſigned to ſupply any defect in the conveyance, and not as an execution of the articles.

As to THE THIRD POINT; there might have been ſomething more to have been ſaid for it, if the articles had been to ſettle land generally, and not ſuch and ſuch lands in particular, naming them.

This decree was affirmed in the houſe of lords (*b*).

(*a*) See Jones *v.* Laughton, 1 Eq. Caſes Abr. 302. Nandich *v.* Wilkes, 1. Eq. Caſes Abr. 373. Cuſack *v.* Cuſack, 1 Brown P. C. 470. Weſt *v.* Erſſey, 2 Peer Wms. 349.

(*b*) See 9. Mod. 161. and 2. Brown's Parl. Caſes, 132.

Caſe 216.

Hancock *againſt* Hancock.

Bond fraudulently obtained

S. C. 2. Eq Abr. 219.

HANCOCK had iſſue two ſons; the one married a daughter of *Doiſwell*; the other, being the youngeſt, having made his addreſſes to a lady, and all things being adjuſted and concluded upon for the wedding, *Doiſwell* took the young gentleman aſide, ſhewed him a bond ready drawn, which as he ſaid was prepared by the direction of his father, and told him, that unleſs he would execute it, his father would not ſuffer the match to proceed; and moreover, that he muſt not ſo much as mention anything relating to this bond, as he valued his father's diſpleaſure.

The

The condition of this bond was, that if he ſhould die without iſſue by that marriage, he would leave three thouſand pounds to one or more of the children of the elder brother, who had married this daughter of *Dolſwell*.

The young gentleman under this terror executes the bond.

Afterwards he ſpoke to his father of it, who denied that he ever gave ſuch directions, and gave him three thouſand pounds to indemnify him againſt the bond, which three thouſand pounds was, when this bond ſhould be delivered up to him, to be diſtributed among the grandchildren. The father dies; the ſecond ſon in his life-time, and by his will, gave * in land and money more than three thouſand pounds to one of the children of his elder brother, and dies without iſſue. The only evidence of the manner by which this bond was extorted, was a recital in the will of the ſecond ſon. It was proved in the cauſe, that when the younger brother was making theſe gifts in favour of his elder brother's ſon, he was adviſed to declare, that this was in ſatisfaction of the bond; but his anſwer was, that this would look like complying with a bond which he had all along declared had been unjuſtly extorted from him.

* [439]

This bond was of fifty years ſtanding.

PARKER, *Lord Chancellor*. I make no doubt but this bond was fraudulently extorted; but I know not how to come at it; for to allow a recital in the will of the obligor, as evidence to overthrow a bond, may be a thing of dangerous conſequence. However I think the bond has been ſatisfied; and the reaſon given why he would not declare it to be in ſatisfaction, does very plainly amount to a declaration of his intention, that he did not deſign to make the gifts he did, over and above the ſatisfying his bond.

TRINITY TERM,

The Fifth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices,*
Sir John Forteſcue Aland, *Knt.*
Nicholas Lechmere, *Eſq. Attorney General,*
Sir William Thompſon, *Knt. Solicitor General,*

Aſgill *againſt* Hunt.

Caſe 217.

PROCESS in SPIRITUAL COURT for calling a woman "*whore*" in *London*. After ſentence, the court of king's bench was moved for a prohibition.

A prohibition lies to an inferior court, *after ſentence* given, where it appears upon the face of the proceedings that the matter was not within the juriſdiction of the court.

But the prohibition was refuſed.

THE COURT ſaid, that it was a known rule laid down in books, that where it appears upon the face of the libel, that the matter is of temporal and not ſpiritual cognizance, there a prohibition may be granted after ſentence; but not where it does not appear; for there it muſt be taken advantage of before ſentence (*a*). Now here the offence in the libel is certainly a matter of ſpiritual cognizance; and though it appears in the libel, that * the words were ſpoken in *London*, yet that would not take away the juriſdiction of the ſpiritual court, were it not for a particular cuſtom, by virtue of which thoſe words are puniſhable in *London*: but this being a particular

S.C. 1. Stra. 187. S. C. Fort. 347. * [440] 3. Atk. 52. 4. Viner, 11. 6. Com. Dig. 108. Bunb. 81.

(*a*) See Baniſter *v.* Hopton, Ante, 12. Symes *v.* Symes, 2. Burr. 813. Paxton *v.* Knight, 1. Burr. 314. Rex *v.* Rector of Boſworth, 1. Ld. Ray. 435. Full *v.* Hutchins, Cowp. 424. Darley *v.* Coſens, 1. Term Rep. 552. Blacquiere *v.* Hawkins, Dougl. 377. Ladbroke *v.* Cricket, 2. Term Rep. 649.

ARGILL *against* HUNT.

particular cuſtom, the Court can no more judicially take notice of it, than they can of any other cuſtom of the city of *London* (*a*); and if a cauſe be removed out of the City courts by *habeas corpus*, the cuſtom muſt be returned, or no *procedendo* can ever be granted.

(*a*) The book of the town-clerk of *London* contains no account of any cuſtom to cart whores in the city of *London*, and it is ſaid that this cuſtom has never been proved in ſuch a manner as to maintain an action in *Weſtminſter-Hall*. Staunton v. Jones, Dougl. 380. *note*.

Caſe 218.

Dr. Bows *againſt* Jurat.

A prohibition lies to the ſpiritual court to ſtay a ſuit for *Eaſter offerings*, on a ſuggeſtion of a cuſtom to pay them, although ſentence was given againſt the defendant by default.

Moor, 916. 1. Roll. Rep. 259. Carth. 33. Cro. Jac. 670. 6. Com. Dig. 310.

DR. BOWS, vicar of *New Romney*, brought a libel in the ſpiritual court againſt the defendant, one of his pariſhioners, for *Eaſter offerings*; ſuggeſting that they had, time out of mind, uſed to be paid in that pariſh.

The defendant made no defence at all in the ſpiritual court; but after ſentence againſt him, moves the court of king's bench for a prohibition.

The motion was granted *niſi*.

The reaſon why the Court doubted, whether the prohibition was to be granted or not, was their ignorance of the practice of the ſpiritual court. For the Court ſeemed clearly of opinion, that if the practice of the ſpiritual court was agreeable to that of the courts at law, *viz.* to take every thing *pro confeſſo* againſt a defendant that makes no defence, and ſo give ſentence for the plaintiff without obliging him to prove the truth of his caſe, then the prohibition was not to be granted; becauſe the cuſtom ſet forth by the plaintiff was not denied by the defendant, and conſequently no occaſion for trial of the cuſtom. But in caſe the practice of the ſpiritual court was, not to give ſentence for the plaintiff, even in caſe of no defence made by a defendant, without proof made to the Court by the plaintiff of the truth of his caſe, that * then a prohibition was to be granted; becauſe then the ſentence of the ſpiritual court was founded plainly upon proof made before them of a cuſtom, which is not to be permitted, becauſe the proof required by them is very different from that required by the common law.

* [441]

DR. PINFOLD, who ſpoke againſt the prohibition, ingenuouſly owned, that it was the practice of the ſpiritual court to require proof.

However, THE COURT took time to conſider, and would not make the rule abſolute.

TRINITY

TRINITY TERM,

The Fifth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

Upwell *againſt* Halſey.

Caſe 219.

If a teſtator deviſe all his perſonal eſtate to his wife, and that ſuch part thereof as ſhe ſhall leave of her ſubſiſtence ſhall return to his ſiſter, the ſiſter ſhall have the reſidue after the death of the wife.

S. C. 1. Peer. Wms. 651. S. C. 2. Eq. Abc. 325. 347.

THE clauſe of the will upon which this caſe turned, was this: "I make my wife whole and ſole executrix of all my perſonal eſtate; and my will is, that ſuch part of my perſonal eſtate as ſhe ſhall leave of her ſubſiſtence, ſhall return to my ſiſter." The intereſt of the perſonal eſtate was not ſufficient to maintain the wife. The wife after marries.

The diſpute was between the ſecond huſband of the wife, and the ſiſter of the firſt huſband.

SIR JOSEPH JEKYLL, *Maſter of the Rolls*, before whom the cauſe was heard, gave it in favour of the ſiſter. He ſaid, that ſuch a ſenſe, if poſſible, ought to be put upon a will, as is agreeable to the intention of the party, and conſiſtent with the rules of law. And ſuch a one he thought this will was capable of; for he underſtood it thus: "I deviſe the uſe of my perſonal eſtate to my wife for her life, with a power" (the intereſt not being ſufficient for her maintenance) "to diſpoſe of as much of the principal as ſhall be neceſſary for her ſubſiſtence;" and his ſiſter to have the reſidue. He thought no ſtreſs was to be laid upon thoſe words, "all my perſonal eſtate;" for that is no more than what the law implies; for when a perſon is made executor, * the law veſts all the perſonal eſtate in him. But then it is true, that this gift, which by conſtruction of law is abſolute, may be qualified by the declared intention of the teſtator. Here it is reſtrained to her for her life; but with a power, indeed, to diſpoſe of ſo much of the principal,

Uthwatt *againſt* Halsey.

principal, as ſhall be neceſſary to her ſubſiſtence, over and above the intereſt:

An account was accordingly decreed to be taken, with directions ſuited to this conſtruction of the will (*a*).

(*a*) See Aſtley *v.* Powis, 1. Vezey, 499. Beckham *v.* Croſs, 2. Vezey, 471. Neal *v.* Attorney General, Moſeley, 246. Bacon *v.* Clerk, 1. Peer Wms. 478. Kelly *v.* Bellew, 1. Bro. P. C. 202.

Caſe 226.

Farrington *againſt* Knightly.

If a teſtator make two executors and give them fifty pound a-piece, and bequeath other legacies to his relations, the executors ſhall be truſtees of the reſidue for the next of kin.

8. C. Prec. Ch. 566.
S. C. 1. Peer Wms. 544.
S. C. 2. Eq Abr. 221. 424. 440.
2. Vern. 99.
2. Atk. 18.
2. Bro. C. C. 634.
3. Bro. C. C. 28.
1. Peer Wms. 7.

THE TESTATOR made two executors to his will, and gave each of them a legacy of fifty pounds a-piece. He gave legacies likewiſe to all, or moſt of his relations; and then there being a ſurplus of the eſtate, to the amount of about twelve hundred pounds, unexhauſted by debts and legacies,

The queſtion was, How this ſurplus ſhould go, whether according to the ſtatute of Diſtributions, or to the executors?

PARKER, *Lord Chancellor*. There are ſeveral ancient laws, by which the eſtate of an inteſtate was made diſtributable, in a manner, as it is now by the ſtatute of 22. & 23. *Car.* 2. c. 10. So that law is in reality but declaratory of what the old law was; and yet, which is very ſtrange, before that ſtatute, the temporal courts were uſed to prohibit the ſpiritual court, when they went about to compel the party to make a diſtribution, in conformity to thoſe laws. As to the preſent caſe; it is more material, it may be, that the law ſhould be ſettled and known, than which way it is ſettled. The very examination of witneſſes in the caſe *Littlebury v. Buckley* (*a*), is a plain proof that the law is in this point very unſettled. * It may, perhaps, be of miſchievous conſequence to overthrow the authority of the caſe of *Foſter v. Mount* (*b*), and the ſubſequent reſolutions founded upon the authority of that. Though it is highly probable, that if in the caſe of *Foſter v. Mount*, the ſurplus had been leſs conſiderable, the reſolution would have been otherwiſe; but the executor being an attorney, and a ſtranger to the teſtator, and the ſurplus very conſiderable, it ſeemed to be a very groſs abſurdity to ſuppoſe, that the teſtator could ever intend to give away ſo very conſiderable a ſurplus, from his relations, to ſuch an executor. He further obſerved, that this will carried with it the ſuſpicion of being unfiniſhed and incomplete, for want of the uſual concluſion, "in witneſs whereof "I have put my hand and ſeal;" a very ſtrong circumſtance to induce a belief, that this ſurplus was never deſigned for the executors.

* [443]

He took further time to conſider of his decree (*c*).

(*a*) 2. Vern. 674.
(*b*) 1. Vern. 73.
(*c*) The Lord Chancellor afterwards delivered his opinion, that the executors having an expreſs legacy of fifty pounds each, ſhould be truſtees of the ſurplus of the perſonal eſtate for the next of kin, according to the ſtatute of Diſtributions. See S. C. 1. Peer Wms. 550. Mr. Cox's note at the end of the caſe; Petit *v.* Smith, 1. Peer Wms. 7. and Carey *v.* Gooding, 3. Brown, C. C. 110.

MICHAELMAS TERM,

The Sixth of George the Firſt,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*

Nicholas Lechmere, *Eſq. Attorney General.*

Sir William Thompſon, *Knt. Solicitor General.*

NOTE. PRATT, *Chief Juſtice*, was abſent all this Term, being ill of an ague and fever.

Anonymous.

Caſe 221.

SCIRE FACIAS in the court of common pleas upon a recognizance taken in an action of debt; judgment for the plaintiff, and error brought.

A *ſcire facias* on a recognizance in an action of debt, aſſigning the breach in the words of the condition, "that "he ſhould ren- "der himſelf in "execution of "the judg- "ment," is good.

IT WAS INSISTED *for the plaintiff in error*, that the breach was not well aſſigned; for though it be a general rule, that a breach aſſigned in the very words of the condition, is a good aſſignment; yet that rule does not hold, where the words are by law interpreted contrary to their natural ſignification, which is the caſe here. For the words of the condition are, "that he ſhould ren- "der himſelf in execution of the judgment;" which words, in their natural ſenſe, import an act that it is impoſſible for the bail to do, for it is the principal only that can render himſelf in execution of the judgment; ſo that the meaning of the words in *this caſe muſt be, to render himſelf in order to execution. And therefore the pleading ſhould not have been in the very words of the condition, but in ſuch words as are expreſſive of that ſenſe,

ANONYMOUS. ſenſe, that the words of the condition are, by operation of law, to be underſtood in. If there are two joint-tenants, and the one by deed grant all his eſtate to his companion, this will in operation of law be underſtood and expounded as a releaſe, that being the proper conveyance in law from one joint-tenant to another. But if the party had in this caſe pleaded *quod conceſſit*, it had been naught; for though in a deed, rather than it ſhould be void, it ſhall be expounded a releaſe, it is not ſo in pleading, where words muſt be always underſtood in a ſtrict and proper ſenſe. 2. *Saunders*, 97.

This objection was over-ruled by THE COURT, who were all of opinion, that the words in the pleading muſt be underſtood in the ſame ſenſe, as when uſed in the condition of the recognizance.

Advantage cannot be taken of variance between *ſcire facias* and *recognizance*, after omitting *oyer* in the court below.

THEN IT WAS URGED *for the plaintiff in error*, that there were variances between the *ſcire facias* and the recognizance.

THE COUNSEL *for the defendant* acknowledged that there were variances, and material ones; but inſiſted, that the plaintiff could not now take advantage of them; becauſe he had not, by demanding *oyer* of the recognizance in the court below, made it part of the record, and ſo brought it before this Court; and that as it ſtands now, the recognizance is no part of the record. *Salkeld*, 262. 264. 1. *Rolle's Abr.* 760. *pl.* 1, 2.

And THE COURT being of this opinion, they gave judgment *niſi* for the defendant in error.

MICHAELMAS TERM,

The Sixth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

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* [445]

* Turton *againſt* Benſon.

Caſe 222.

MRS. TURTON, a widow, being poſſeſſed of an eſtate in land, as her jointure, to the value of four hundred pounds a-year, and having a ſon at the age of twenty-two years, and a barriſter at law, entered into a treaty of marriage for her ſon with *Mr. Benſon.* The agreement was, that *Mr. Benſon* ſhould give with his daughter a portion of three thouſand pounds, and in conſideration of this fortune, *Mrs. Turton* agreed to ſettle immediately the four hundred pounds a-year, which ſhe had an intereſt in for her life, as her jointure, upon her ſon; and three hundred pounds a-year of this very land, was to be ſettled upon *Mr. Benſon's* daughter, as a jointure proportionable to her fortune. When all things were thus agreed upon, and the affections of the young people engaged, *Benſon*, the father of the young lady, takes *Turton* the ſon aſide, and tells him, that his circumſtances would not allow him to give three thouſand pounds with his daughter; however he would do his utmoſt, *viz.* give him two thouſand pounds, and let him have the other thouſand pounds without intereſt for ſeven years; but that he muſt give a bond for the re-payment of this thouſand pounds at the end * of ſeven years; and that unleſs he complied with this, the match ſhould not go on, *Turton*, rather than the match ſhould be broken off, gives the bond. Afterwards a ſettlement, to which *Mrs. Turton*, the mother, was one of the parties, was prepared and executed, in purſuance of the agreement, and expreſsly mentioned to be made in conſideration of a portion of three thouſand pounds, and *Mrs. Turton* actually quitted to her ſon, the intereſt ſhe had for her life,

If by marriage ſettlement, it is agreed to give a man 3000l. as a portion with his wife, in conſideration of a jointure to be made on her, and he, without the conſent of his mother who treated for the marriage, privately give a bond to the wife's father to re-pay 1000l. of the portion in ſeven years, this bond is void in equity, and cannot, on the obligees becoming a bankrupt, be aſſigned to his creditors.

* [446]

S. C. 1. Eq. Abr. 45. 88. S. C. 2. Vern. 764. S. C. Prec. Ch. 522. S. C. 1. Stra. 240. S. C. 1. Peer Wms. 496.

TURTON against BENSON.

knowing nothing of this bond; and the marriage took effect. *Mr. Benſon* owed *Sir Theodore Janſen* a conſiderable ſum, for which he and his ſon were both bound; but *Sir Theodore*, not ſatisfied with this, procured from *Mr. Benſon*, the father, an aſſignment of this bond thus procured from *Turton* the ſon-in-law, as a collateral ſecurity for his debt. *Benſon* the father, four years after the marriage, dies, very conſiderably indebted to *Sir Theodore*, *Mrs. Richardſon*, and others, both by bond and ſimple contract. Aſſets were left ſufficient to pay the bond debts; but not the debts by ſimple contract. *Mrs. Benſon*, the widow, takes out adminiſtration. The debt to *Sir Theodore* was immediately diſcharged; the ſon being bound for it as well as the father. Afterwards the adminiſtratrix and the ſon enter into a deed of compoſition with *Mrs. Richardſon*, and the major part of the creditors. By this deed of compoſition it was agreed, that the adminiſtratrix ſhould pay ſmall debts of a trifling nature, as ſervants wages, &c. to the value of about two hundred pounds; that an office the father had purchaſed for the ſon ſhould be ſold, and the profits ariſing from the ſale ſhould be aſſets; that all the creditors, parties to this deed, ſhould be paid in equal proportion out of the aſſets, without regard to the nature of their debts, whether bond or ſimple contract. That the adminiſtratrix ſhould do her endeavour to get in all the debts [447] ſtanding out; and that the * adminiſtratrix ſhould not be ſued or moleſted by any of the creditors, parties to this agreement. Whatever ſhould be hereafter got in or recovered of the debts ſtanding out, was to be equally divided among the creditors. It was proved in the cauſe, that *Mrs. Richardſon*, hearing that this bond was to be aſſigned to her, went to *Mr. Turton* to talk with him about it; and that *Mr. Turton* told her, that if he had to do with the family of the *Benſons*, he would never pay the bond, for he had, he was ſure, law of his ſide; but if it was to be aſſigned to her, he would not diſpute it. This diſcourſe was about ſix weeks before the deed of compoſition; but was poſitively denied by *Turton* in his anſwer.

THE QUESTION was, Whether *Turton*, the ſeven years being expired, ſhould be obliged to pay this thouſand pounds, for which the bond was given, to the creditors of *Mr. Benſon*?

There were ſeveral authorities produced to ſhew, that bonds of this nature had been relieved againſt in equity. The caſe of *Kemp v. Coleman (a)*, laid down as a rule in equity, that where the ſon, without the privity of father or parent, during the treaty of the match, gives a bond to return, or refund any part of the portion, ſuch bond is void. In the caſe of *Lord Hamilton v. Lord Mohun (b)*, one of the covenants was, that the intended huſband ſhould, within two days after the marriage, releaſe to the guardian of the young lady, all accounts of the meſne profits of an eſtate belonging to her; and COWPER, *Lord Chancellor*, held this co-

(a) 2. Salk. 156. (b) 2. Salk. 158.

venant

venant void, admitting it obtained neither by ſurprize nor fraud, becauſe it was for the private benefit of the guardian; and compared this ſort of contracts to brokage bonds, but thought them * of a more miſchievous conſequence; and the rule mentioned in the former caſe was again laid down. In the caſe of *Goldſmith v. Bunning (a)*, a note for payment of ſo much money was given to a maid-ſervant, in conſideration of the endeavours ſhe was to uſe for the procuring ſuch a match; the maid-ſervant marries one that knew nothing of the conſideration of the note, but was induced to have her upon account of the money he thought her entitled to by the note; ſo that he might be looked upon as a purchaſer of this note for a valuable conſideration, without notice of the reaſon for which this note was given; and yet the note was ſet aſide. In *Lamlee v. Hayman (b)*, a mother agreed to part with her jointure, for the advancement of her ſon in marriage; but took a private ſecurity from her ſon, to aſſign over to her, immediately after the marriage, a leaſehold eſtate, that the ſon was entitled to, and poſſeſſed of as his own. This agreement was ſet aſide in equity. In the caſe of *Peyton v. Blaidwell (c)*, *Blaidwell*, upon the marriage of his kinſman, agreed to ſettle upon him ſuch an eſtate in poſſeſſion, and ſuch in reverſion; but entered into a private agreement with the kinſman, that after the marriage took effect, he ſhould re-demiſe, &c.: this agreement was ſet aſide in equity, and *Blaidwell* forced to account for the meſne profits of what was thus re-demiſed, in purſuance of the private agreement. In the caſe of *Sloan v. Fowler (d)*, *Fowler*, the father, told his ſon he would not give his conſent to his marriage with *Sloan's* daughter, except he would enter into bond to pay him ſuch a ſum of money, as he ſaid he wanted for a proviſion for his younger children; upon which the ſon, rather than the match ſhould go off, gave his father his bond for the ſum required; and this bond the ſon was relieved againſt, upon a bill brought by himſelf and his father-in-law.

* [448]

* [449]

* THE COUNSEL *for the creditors* inſiſted much upon the age and profeſſion of *Turton*, the one twenty-two years, the other a barriſter at law; but they ſeemed to own, that with reſpect to the adminiſtratrix of *Mr. Benſon*, they ſhould have had a hard caſe of it; but that now it being againſt creditors, that would diſtinguiſh this caſe from the reſt of the caſes cited. They inſiſted upon the aſſignment of this bond to *Sir Theodore*; upon the acquieſcence of *Turton*, during the life of *Mr. Benſon*, which was four years after the match; and upon the diſcourſe that paſſed between *Turton* and *Richardſon*, which was an inducement to her to come into this compoſition. The caſe of *Ellis v. Warner (e)* was cited, where an uſurious contract was held good, in favour of an innocent perſon.

(a) S. C. 1. Eq. Abr. 89.
(b) 2. Vern. 466. 499.
(c) May, 1684. 2. Vern. 500.
(d)
(e) Cro. Jac. 32. S. C. Moor, 752. S. C. 1. Brownl. 85. S. C. Yelv. 47.

TURTON *againſt* BENSON.

THE COUNSEL for *Turton*, in their reply, quoted the caſe of *Taylor v. Wheeler (a)* to ſhew that an aſſignee could not be in a better condition than the bankrupt; from whence it was inferred by parity of reaſon, that the creditors in the preſent caſe could not be in a better condition than *Mr. Benſon*, or his adminiſtratrix.

2. Vern. 564, 565, 566.

PARKER, *Lord Chancellor*. All agreements of this nature are odious, and have as conſtantly been ſet aſide by this Court, as they have been brought before it, even in favour of thoſe very perſons that were parties to the agreement (*b*). In this caſe there are plainly two agreements; the one open and above-board, the other ſecret and private, and derogatory of the former. By the firſt the fortune is three thouſand pounds, by the latter it is reduced to two; and this plainly to the deceit of the mother, a party to the ſettlement, who, upon conſideration of this fortune, * actually quitted her jointure, in order to make this ſettlement. And if this bond be naught as to *Benſon*, no aſſignment of his can make it good; for if it ſhould, there is an end at once of the juriſdiction of this Court over frauds; for then no matter how vicious and fraudulent the agreement be; make but an aſſignment, and that will cure all (*c*). When bonds are aſſigned, the meaning is, that the aſſignee is to have all equitable advantages that the aſſignor could have had. Suppoſe a bond is aſſigned, upon which both principal and intereſt are diſcharged, ſhall the aſſignee recover the penalty, which the obligee had no right to (*d*)? I do not ſay this bond is ſo void, as that no ſubſequent agreement, upon good conſideration, could make it valid. But nothing like this is in the preſent caſe. As for *Sir Theodore* and the aſſignment to him; his debt being paid, he is entirely out of the caſe. As to the *deed of compoſition*, as it is called, between the adminiſtratrix and the creditors; there is nothing in it to influence this caſe, nor can there in the nature of it be found ſo much as one reaſon, drawn from this bond, to induce them to enter into it. It is only an agreement made between the creditors, for preventing the waſting of the aſſets in law expences, and reſtraining the adminiſtratrix from giving that preference to debts, that by law ſhe might. As for *Turton's* promiſe to *Mrs. Richardſon*, if true (for it is poſitively denied by *Turton*), how far in honour it may bind him is nothing to me. It was a promiſe made upon ſuppoſition of an aſſignment that was never made; nor can ſhe be ſuppoſed to become a party to this agreement upon account of this promiſe. The making of the profits ariſing from the ſale of the office is aſſets; the preference

* [450]

(*a*) 2. Salk. 499.

(*b*) Peyton *v.* Bladwell, 1. Vern. 240. Redman *v.* Redman, 1. Vern. 348. Gale *v.* Lindo, 1. Vern. 475. Lambly *v.* Hanam, 2. Vern. 499. Keat *v.* Allen, 2. Vern. 558. Pitcairne *v.* Orbourn; 2. Vezey, 375. Neville *v.* Wilkinſon, 1. Brown's C. C. 543. Roberts *v.* Roberts, 3. Peer Wms. 66. Arundel *v.* Trevillian, 1. Ch. Rep. 47. Smith *v.* Attwell, 3. Atk. 566. Jackſon *v.* Duchaire, 3. Term Rep. 551.

(*c*) See 2. Vern. 692.

(*d*) See Hill *v.* Caillovel, 1. Vezey, 122.

the

the adminiſtratrix might have given to other debts, had ſhe refuſed; are plain and * good reaſons for her to come into it. Creditors are, it is true, intitled to favour; but this is only with reſpect to the eſtate of the debtor (*a*).

TURTON *againſt* BENSON.

* [451]

(*a*) This caſe was originally heard at the Rolls, in Michaelmas Term 1718, and the Maſter of the Rolls decreed that the plaintiff ſhould be relieved and the bond delivered up, S. C. 2. Vern. 764. Gilb. Chan. 288. from this decree the preſent caſe was an appeal, on which the former decree was affirmed, S. C. 1. Peer Wms. 498.—See Webber *v.* Farrer, 2. Brown P. C. 88. Hamilton *v.* Mahon, 1. Peer Wms. 118. Montefiori *v.* Montefiori, 1. Black. Rep. 363. Morriſon *v.* Arbuthnot, 1 Brown's C. C. 548. Jackman *v.* Duchaire, 3. Term Rep. 551.

Blunden *againſt* Barker. Caſe 223.

THE BILL was brought by *Mr. Blunden* in right of his wife, who was the daughter of *Ibbot* the teſtator; and by the widow of the ſaid teſtator; againſt *Mrs. Barker*, who was the other daughter of *Ibbot*; and adminiſtratrix with the will annexed, to have a diſcovery of the eſtate of the deceaſed *Mr. Ibbot*, and to have the will ſet aſide; as far as it was prejudicial to the right of his wife; as a daughter of a citizen of *London*; or to the right of the widow; as the wife of a citizen.

Of the cuſtom of *London* with reſpect to the eſtates of freemen.

S. C. 2. Eq. Abr. 258. 268. S. C. 1. Peer Wms. 633.

Upon the pleadings the caſe came out thus:

Ibbot, the teſtator; had by his firſt wife iſſue *Anne Barker*, the defendant; and by the ſecond (his preſent widow, one of the plaintiffs), *Eſther Blunden* married to the plaintiff, againſt the conſent of the father. Upon the marriage of *Mr. Ibbot*, the teſtator, with his ſecond wife, now widow, there were articles of agreement precedent to the marriage, entered into by *Mr. Ibbot* and the preſent widow. The ſubſtance of which articles were, that *Mr. Ibbot* ſhould leave her, at his death, an eſtate in land for her life of eighty-five pounds a year, four hundred pounds in money, and all her jewels; and that ſhe ſhould enter into a bond of three thouſand pounds penalty, in truſt for *Mr. Ibbot*; the condition of which bond was, that if theſe terms were made good to her, ſhe would, within two months after the death of *Mr. Ibbot*, releaſe to his executors all right and title that ſhe might have to any part of his eſtate real or perſonal, by dower, cuſtom of *London*, or otherwiſe. The bond was entered into accordingly; and in the year 1684 the match took effect. * In the year 1706 *Mr. Ibbot* married his eldeſt daughter *Mrs. Barker*, and gave her for her portion, as appeared by the marriage ſettlement, four thouſand pounds in money, beſides lands and tenements (amongſt which there was the reverſionary intereſt of a leaſe) to a conſiderable value. To this ſettlement, among others, *Mr. Ibbot* the father was a party; and the certainty of *Mrs. Barker's* advancement appeared no otherwiſe than by the father's being a party to this ſettlement, wherein no value was put either upon the freehold eſtate, or the reverſionary

* [452]

BLUNDEN against BARKER.

ſionary intereſt of a leaſe ſettled upon her. But precedent to the marriage, the father thought fit that *Mrs. Barker* his daughter ſhould, before her marriage, execute to him a releaſe, to which the lawyer that drew the ſettlement, and *Mr. Barker* the intended huſband, ſhould be parties; wherein his daughter ſhould, in conſideration of her preſent advancement, releaſe to her father, his executors and adminiſtrators, all intereſt, right and title, &c. that ſhe had or ſhould have to any part of his eſtate, real or perſonal, by cuſtom of the city, ſtatute of Diſtributions, or otherwiſe; ſave what her father ſhould pleaſe to give her by his laſt will. And this releaſe was accordingly executed. *Mrs. Barker*, before this, had ſome ſmall matter in land and money left her by other relations, the intereſt and profits of which were received by the father; but no account was ever made up between them. Some time after this, *Mr. Blunden*, the plaintiff, married the other daughter of the teſtator *Ibbot*, without his conſent. Afterwards *Mr. Ibbot* made his will, which, as far as is material to this diſpute, was to this purpoſe: He gave to his wife during her life the intereſt of ſo much *Bank* and *Eaſt-India* ſtock as amounted to twelve hundred pounds a-year. He gave his two grandchildren by * *Mrs. Barker* five thouſand pounds a-piece; then he gave a leaſehold eſtate in truſt for *Mr. Blunden*, during the life of his wife, and after her deceaſe, in truſt for the children of *Mrs. Blunden*, and in default of ſuch, in truſt for his own right heirs. He gave all his real eſtate to *Mrs. Barker*, and likewiſe makes her reſiduary legatee of all his perſonal eſtate. *Ibbot* died, leaving a very conſiderable eſtate, both real and perſonal.

*[453]

The points in this cauſe were three:

FIRST, Whether *Mrs. Ibbot* the widow be barred, by the articles of agreement and the bond, from claiming her cuſtomary ſhare?

SECONDLY, If ſhe be barred, what is to be done with her cuſtomary ſhare, *viz.* Whether the huſband is to be conſidered as dying without a wife? and ſo the eſtate is to be divided into two moieties; the one moiety to go among the children, the other moiety to be the teſtamentary part of the teſtator. Or whether this agreement, by which the wife is barred, being founded upon the conſideration of a ſettlement upon her of a real eſtate, *Mr. Ibbot* ſhould not be conſidered as a purchaſer of his wife's third, and ſo have a right to diſpoſe of two-thirds of his eſtate by will?

THIRDLY, Whether *Mrs. Barker* in this caſe was barred from claiming her cuſtomary ſhare? either upon account, FIRST, of the releaſe executed to her father; or, SECONDLY, for want of a ſufficient certainty of her advancement appearing under the hand of the father.

In caſe the widow is barred, and the huſband is to be conſidered as a purchaſer, and *Mrs. Barker* is barred, *Mr. Blunden*, in right of

of his wife, will be intitled to one-third of the perſonal eſtate of the teſtator. BLUNDEN *againſt* BARKER.

In caſe the widow is barred, *Mrs. Barker* barred, and the huſband is to be conſidered, not as a purchaſer, but as dying without a wife, then *Mr. Blunden*, in right of his wife, has a clear title to a moiety.

* But in caſe the wife is barred, and the huſband is to be conſidered as a purchaſer, and *Mrs. Barker* not barred, then will *Mr. Blunden*, in right of his lady, be intitled only to a moiety of the third part of the perſonal eſtate of the teſtator. * [454]

This cauſe coming to a hearing before SIR JOSEPH JEKYLL, *Maſter of the Rolls*, he was pleaſed to decree:

FIRST, That the wife was barred: But what the conſequence of that was, whether the huſband was to be conſidered as dying without a wife; or whether, in regard the wife was compounded off by the ſettlement of a real eſtate, the huſband was to be conſidered as a purchaſer of his wife's third; he ſent to THE CITY, to be certified what their cuſtom was.

SECONDLY, He decreed *Mrs. Barker* barred, both by the releaſe, as a ſubſiſting agreement in equity; and alſo becauſe there was not ſuch a certainty appearing under the hand of the father, as the cuſtom of the city required to let her in to claim her ſhare (*a*). And conſequently he was of opinion, that *Mr. Blunden* had in all events, in right of his wife, a title to one-third; but in caſe, by the cuſtom of the city, *Mr. Ibbot* was to be eſteemed as dying without a wife, then to one entire moiety of the perſonal eſtate of the teſtator.

Mrs. Barker not acquieſcing under the determination of THE MASTER OF THE ROLLS,

THE CAUSE was again brought on before PARKER, *Lord Chancellor*.

In ſupport of the decree of the Maſter, and in favour of *Mr. Blunden*, IT WAS INSISTED UPON, that the wife may by an agreement before marriage bar herſelf of her cuſtomary ſhare; and that when this is done, the huſband is always conſidered as dying without a wife; and no difference made when the eſtate, by which the wife is thus compounded off, is real, and when perſonal. In the caſe of *Hancock v. Hancock (b)*, the wife was barred by a jointure of land; and yet held expreſsly, that the * eſtate ſhould be divided into moieties. In the caſe of *Rawlinſon v.* * [455]

(*a*) But not by 11. *Geo.* 1. c. 18. ſ. 17. it ſhall be lawful for all perſons who, after the firſt of *June* 1725, ſhall become free of the city, and for all who at that day ſhall be unmarried, and not have iſſue by any former marriage, to diſpoſe of their perſonal eſtate.

(*b*) 2. Vern. 665.

BLUNDEN against BARKER.

Rawlinſon (a), the wife was compounded off out of a real eſtate; and yet held, that the huſband ſhould have a moiety for his teſtamentary ſhare. In the caſe of *Clare v. Auchmuty (b)*, the children were all advanced in full; and it was held, that in that caſe the father was to be conſidered as dying without children, and the eſtate was to be divided into moieties, the one moiety to go to the wife, the other to be the teſtamentary ſhare of the father; and not at all conſidered, what the nature of the eſtate was, whether real or perſonal, out of which the children were advanced.

It was urged, that as to the bond given by the wife, though in law it can bind no further than the penalty; yet in equity, the bond and articles make but one agreement: and therefore not in the liberty of the wife, by incurring the penalty of the bond, to free herſelf from the agreement.

As to the releaſe given by *Mrs. Barker*; it was acknowledged, that at law, as a releaſe, it would be void; but it was urged, that it would ſubſiſt as a good agreement in a court of equity.

It was urged, that if a jointure made precedent to marriage, could bar a woman of her dower; and that if a woman could, by an agreement precedent to marriage, bar herſelf of her cuſtomary ſhare; in neither of which caſes the woman has ſo much as an inchoate right at the time of the bar: *à fortiori* may a daughter releaſe that right which as a right is already by her birth veſted in her, though not to take effect in poſſeſſion until the death of the father.

As to the objection, that if the father be allowed to take releaſes from his children, it will leave room for the father to impoſe upon his children, by that authority that a father has naturally over his child: it was anſwered, that this was not the caſe here; the * advancement was a very handſome and a very conſiderable one; and the intended huſband and the lawyer that drew the ſettlement were witneſſes to the releaſe. Beſides, if fathers cannot take releaſes from their children, ſome way or other, it will be a diſcouragement to fathers from advancing children in their life-time. And in the laſt place, the father has it in his power, as the cuſtom now ſtands, to cut off his children from their cuſtomary ſhare; for it is but to give them ſome inconſiderable advancement, and take care not to let it appear under his hand what the advancement was, and the thing is done; it having been ſettled in the caſe of *Fowk v. Edwin*, that an advancement in marriage will cut a child off, provided the certainty of that advancement does not appear under the hand of the father. Upon all theſe accounts it was inferred, that the objection taken againſt theſe releaſes, from the power it would give parents to impoſe upon their children, had very little in it.

* [456]

As to the certainty it was urged, that the decree of the Maſter was right: firſt, becauſe the father being indebted to the daughter,

(a) Prec. Chan 537. (b) 2. Vern. 668

for

for intereſt of money, and profits of land by him received at the time of this releaſe, and this account having been never adjuſted, it was now utterly impoſſible to do it; and conſequently impoſſible to know the certainty of that advancement, which was the remainder after the debt deducted.

Another reaſon of the uncertainty of the advancement was, becauſe no value was put upon the reverſionary intereſt of the leaſe, nor of the freehold lands in the ſettlement.

It had been very eaſy for the father, to have put a value upon theſe things; but it ſeems to have been omitted on purpoſe to corroborate the releaſe, that upon ſuppoſition the releaſe ſhould not prove effectual for the cutting her off, the uncertainty of the advancement in this ſettlement might.

* If it ſhould be ſaid, that *id certum eſt quod certum reddi poteſt*; and that this advancement, how uncertain ſoever it be upon the ſettlement, is yet capable of being reduced to a certainty; * [457]

It may be anſwered, that it is true it may ſo, *viz.* by the chargeable and dilatory way of either a trial at law before a jury, or by an account before a Maſter; but this is not ſuch a certainty as the cuſtom requires, which on purpoſe to avoid theſe inconveniencies, has fixed and preſcribed the way, by which this certainty is to appear, *viz.* the hand of the father. If this were not ſo, the cuſtom as to the certainty would ſignify juſt nothing; for there is nothing but may ſome ſuch way be reduced to a legal certainty.

If it be objected, that the cuſtom not extending to land, the uncertainty of the freehold eſtate is not material: the anſwer is, that though the cuſtom does not extend to land, yet the real eſtate as well as the perſonal, making part of the conſideration upon which this releaſe was given; it ſeems not reaſonable, that ſhe ſhould be releaſed from the agreement, and yet retain ſo material a part of the conſideration of this agreement. This falls in with the equity of the caſes of jointures, where it is held, that though a jointure after marriage, in conſideration the woman ſhall quit her dower, will not bind her from claiming her dower; yet equity will interpoſe, hold her to her election, and not let her have both.

In the caſe of *Atkins v. Waterſon*, a citizen of *London* jointures his wife before marriage with land, to which the cuſtom did not extend. *Lord Chancellor* ſent to the city to certify, Whether this jointure did not bar her of her cuſtomary right? It was certified, that it did not; becauſe not made in bar of her cuſtomary part; but that had it been made in bar, it would have bound her. Rep. of Caſes in Equity 94.

PARKER, *Lord Chancellor*. It ſeems to me, that admitting the cuſtom of the city in general to be, that * the huſband does not become a purchaſer of his wife's third, when before marriage ſhe agrees to accept of a ſettlement out of *land* in bar of her cuſtomary ſhare, any more than he would in caſe the ſettlement had been of perſonal eſtate; yet notwithſtanding, as this particular caſe is circumſtanced, the huſband muſt be conſidered as a purchaſer; and conſequently * [458]

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consequently will have two-thirds of his estate for his testamentary share. Suppose, without any precedent agreement, the wife had, after the death of the husband, released to the executors of her husband all her right to her third by the custom, must not the executors of the husband have had the benefit of the release? No doubt they must. If so, What difference in reason is there, when the same thing is done in pursuance of a precedent agreement, and when without? The notion, that in this case the husband is to be considered as dying without a wife, does necessarily suppose the wife's third so totally destroyed, as to have no more subsistence, either in law or the consideration of the parties, than if the testator had never married: but here it is very plain, that the wife's right to her customary share does still subsist, both in law, and in the consideration and intention of the parties, as a collateral security to the wife for the husband's performing his part of the agreement; because, had he failed, she might have claimed her third.

Where the husband is to be considered as dying without a wife; and where as a purchaser of her customary third.

As to the release executed by *Mrs. Barker*; when the meaning of the parties, the person applying to this Court to make the release bind, and the will, come to be considered, I think it clear, *Mr. Blunden* is not intitled to reap any advantage from it. *Mrs. Barker*, in consideration of her marriage advancement, releases to her father "all right, &c. that she shall have to any part of his estate, "either by statute of Distributions, custom of *London*, or other-"wise, *save what he shall be pleased to give her by his last will.*" Now what * is to be understood by this clause, "save, &c." ? It cannot be save what he should give her out of his own testamentary share; for then it signifies just nothing, for the release did not extend to that, nor could the parties think it did. It must then have relation to some part of the estate, which, it was thought by the parties, the release did cut her off from. And then the meaning must be this (and a very natural meaning it is), that in consideration of so handsome a settlement as I now make you, you shall promise me to be content with such part of your customary share, as I shall think fit to give you by my will; and consequently it was the meaning of the agreement, that the father should be considered as a purchaser of his daughter *Barker's* customary share. And then the meaning of the agreement, which in a court of equity is chiefly to be considered, will be equally prejudicial to *Mr. Blunden's* right, as if it was left to its fate at law, where doubtless it would be void. As to the person that now applies to make this release good; it is to be considered, that it is not the father to whom this release was executed, that comes into this court, to have the benefit of it; but it is a daughter married against the consent of her father, that comes into this court, to support a release void at law, as an agreement in equity, in order, in a great measure, to break in upon the will of her father, to whom the release was executed. It seems to me a very harsh doctrine, and what, it may be, was never done, for a third person to come into a court of equity,

* [459]

Where an agreement is void at law, equity will not carry it into execution in favour of a third person, and contrary to the meaning of the parties.

by

to enforce an agreement void in law, in direct oppoſition to the meaning of the parties to the agreement. The father had during his life an abſolute power over this releaſe, and might, if he had pleaſed, have diſcharged his daughter from being bound by it. * The queſtion is, Whether he has not done that which was equivalent to it? It ſeems to me that a will, whereby he has given her all her cuſtomary ſhare, is virtually and in equity a plain declaration, that it was never his intention ſhe ſhould be cut off from this ſhare by virtue of her releaſe.

* [460]

If therefore, for theſe reaſons, the releaſe will not ſtand in her way, the next thing to be conſidered is, whether the certainty of her advancement does appear under the hand of the father, in ſuch a manner as the cuſtom requires; for if it does not, then this advancement will cut her off from coming in. And here the queſtion is no more than this, Whether the certainty of her advancement does ſufficiently appear in the marriage ſettlement? for, the father being a party to it, whatever appears there, does appear under the hand of the father. As for the uncertainty of the freehold eſtate, that is nothing to the purpoſe; for the cuſtom extends only to perſonal. The perſonal eſtate in this ſettlement is four thouſand pounds in money, expreſsly declared in part of her fortune; and the reverſionary intereſt of a leaſe, without any value put upon it.

If the certainty of a child's advancement does not appear under the father's hand, it is cut off from claiming a ſhare by the cuſtom. Salk. 427. 2. Vern. 630. Advancement by land, no bar to the cuſtom. 2. Vern. 754.

The firſt objection againſt this being a ſufficient certainty, is the uncertainty of the value of this reverſionary intereſt of the leaſe. In anſwer to this, it is to be obſerved, that the cuſtom of the city is not, that the certainty of the value of the advancement, or the certainty of the ſum, but the certainty of the advancement muſt appear under the hand of the father (*a*). It ſeems to me that there cannot be a greater certainty, and leſs poſſibility of fraud or colluſion, than when the thing itſelf given to the child appears under the hand of the father (*b*). If a father ſhould ſay that * he had given a child ſuch a diamond necklace, deſcribing it, is not this better than if he ſhould put a value upon it? It may be more, it may be leſs than the true worth? Beſides, had this reverſionary intereſt of this leaſe remained part of the teſtator's eſtate *tempore mortis*, it muſt have been valued, and may therefore as well now.

If it appear under the father's hand what things were given a child, the advancement is ſufficiently certain, though the value of them be not expreſſed.

* [461]

The ſecond objection againſt the certainty is, that *Mrs. Barker* had both money and land left her by another anceſtor; and that her father received in her right the intereſt of the one, and the profits of the other, and was at the time of the marriage a debtor to his daughter upon this account; and that therefore it is impoſ-

(*a*) Fawkenor v. Watts, 1. Atk. 406.

(*b*) See Dean v. Lord Delawar, 2. Vern. 628. and the certificate made in this caſe, 1. Peer Wms. 643. *notis.*

ſible

BLUNDEN *againſt* BARKER.

ſible to know the certainty of that advancement, which is the remainder after this debt deducted. The reaſon why the cuſtom of the city requires the certainty of the advancement to appear under the hand of the father, is certainly in favour of the unadvanced children, that the whole of the advancement may be thrown into hotchpot. If therefore it does plainly appear, that a child has not been advanced more than ſuch a ſum, for inſtance four thouſand pounds, nay, that the child has not been advanced quite ſo much, but it is only uncertain how much ſhort of that ſum the advancement was, by reaſon of a trifling debt to be deducted, that cannot be reduced to a certainty; without doubt ſuch an uncertainty may be cured, by the advanced child's quitting entirely this debt, and bringing in the whole four thouſand pounds; for the unadvanced children cannot be prejudiced, by bringing more than the advancement was. Not to admit this for an anſwer were to reduce the cuſtom of the city to this abſurdity, that when a man has a right to ſo much and more, he ſhall loſe that to which he has a certain right, becauſe he cannot tell how much more he is intitled to. * If, therefore, *Mrs. Barker* quits her debt (*a*), this objection is at an end: but it is capable of another anſwer, if this were inſufficient. *Mrs. Barker's* marriage portion conſiſted both of real and perſonal eſtate. If now the freehold eſtate, to which the cuſtom does not extend, be eſteemed to go in ſatisfaction of the debt; then the uncertainty of the debt will not create any uncertainty in the advancement, as far as the cuſtom of the city is concerned in it. And this ſeems agreeable to the juſtice of the Court in other caſes; as where a man indebted by ſpecialties and ſimple contract dies, leaving both a perſonal and real eſtate, this Court will not ſuffer the debts by ſpecialty to be flung upon the perſonal eſtate; and that being exhauſted, leave the debts by ſimple contract unſatisfied, the land not being liable to pay them; but will decree the debts by ſpecialty to be ſatisfied out of the land, and the debts by ſimple contract out of the perſonal eſtate. If, in this caſe, the real eſtate had not been ſettled upon *Mrs. Barker* upon her marriage, but left her by will, *Mr. Blunden* would have thought it very hard, that this debt ſhould have been diſcharged out of the perſonal eſtate, and ſo leſſen his wife's ſhare; when her ſiſter had ſo conſiderable an eſtate in land left her, out of which this debt might have been deducted.

Where it appears a child has not been advanced above ſuch a ſum; but ſomewhat leſs; the uncertainty of the advancement may be cured by the child's bringing the whole ſum into hotchpot.

* [462]

As to the demand of the widow, *Mrs. Ibbot*, that ſhe ſhould not be bound further than the penalty of her bond; there is very little in it. For I eſteem the bond and articles of agreement before marriage, to make but one entire agreement; and the penalty of three thouſand pounds, as circumſtances then ſtood, was thought more than a ſufficient penalty for the enforcement of it. And

(*a*) See Green *v.* Green, 3. Peer Wms. 315. Medcalfe *v.* Ives, 1. Atk. 63. Morris *v.* Burroughs, 1. Atk. 399.

though

though this happens to prove otherwiſe, by an unexpected increaſe of the teſtator's eſtate; yet certainly a court of equity will hold her to her agreement.

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* Upon the whole, it ſeems clear to me, that *Mr. Blunden* is, in right of his wife, intitled only to one half of a third of the perſonal eſtate of the teſtator (*a*). * [463]

(*a*) See the order 1. Peer Wms. 645.

EASTER

EASTER TERM,

The Eighth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

Lady Coventry, Widow of Gilbert Earl of Coventry deceaſed, *againſt* The preſent Earl of Coventry, the youngeſt Brother of Gilbert deceaſed, and Lady Anne Carew, the Daughter and Heir, and ſole Executrix, of the ſaid Gilbert.

Caſe 224.

*[464]

THIS was a bill brought in the court of chancery to hold and enjoy five hundred pounds a-year of the real eſtate of *Gilbert* late *Earl of Coventry*, purſuant to the power reſerved by the will of *Thomas* the father, and the marriage-articles entered into by *Gilbert* precedent to the marriage with the plaintiff; or to have a ſatisfaction out of the perſonal eſtate of *the Earl*; to have likewiſe a legacy of three thouſand pounds given her by the will of * her huſband; and ſome other proviſions made for her jointure by theſe articles; for as her portion was ten thouſand pounds, ſo it was agreed in the marriage-articles that ſhe ſhould have a thouſand a-year in land or money for her jointure.

Tenant for life, with power to ſettle 500l. *per annum* out of ſuch and ſuch lands on a wife, enters into marriage-articles, by which he covenants, for himſelf and his heirs, &c. that he or his heirs would, in purſuance of this power, or otherwiſe, ſettle 500l. *per annum*. The marriage takes effect, and a ſettlement is drawn accordingly by his direction, of ſuch lands as were comprized within the power;

THOMAS *Earl of Coventry*, the father of the ſaid *Gilbert*, ſettled his eſtate by his will, bearing date *March* 24, 1698: which ſettlement, as far as concerns the preſent queſtion, was to *Gilbert* his ſon for his life; then in tail-male to the firſt, ſecond, &c. ſons of *Gilbert*; remainder to his ſecond ſon the preſent *Earl of Coventry* for his life; remainder in tail-male to his firſt, ſecond, &c. ſons; and ſo on. And further on in the will this clauſe was added: "PROVIDED NEVERTHELESS, that notwithſtanding anything "herein-before contained, it ſhall be lawful for any perſon or

but never executed. THE QUESTION was, Whether this ſhould bind the remainder-man? or, Whether the wife ſhould have ſatisfaction made her out of the perſonal eſtate? AND DECREED, upon a ſecond hearing, that the lands ſhould be ſettled.—S. C. Comy. 312. S. C. 1. Eq. Abr. 348. S. C. 2. Eq. Abr. 673. S. C. 9. Mod. 13. S. C. Gilb. E. R. 160.

"perſons

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" perſons that ſhall become ſeiſed of lands or tenements under the " limitations of this my will, by any writing under his or their " hands and ſeal, to limit or appoint any lands, not being copyhold, " nor leaſed out for lives, not exceeding in the whole five hundred " pounds *per annum*, to any wife for her jointure, that ſhall bring " with her a portion equivalent to ſuch jointure." GILBERT late *Earl of Coventry* entered into marriage-articles, bearing date the twenty-third of *June* 1715, by which, in conſideration of a portion of ten thouſand pounds paid, he covenants for himſelf, his heirs, executors, &c. with *Sir Strenſham Maſters*, the father of the plaintiff, his heirs, &c. " that he, or his heirs, ſhould, by deed " indented, &c. at the requeſt of the father, but at the charge of " the earl, his heirs, executors, &c. purſuant to this power reſerved " by the will of his father, or otherwiſe, ſettle upon the plaintiff " for her jointure, or procure to be ſettled, lands of the full value
*[465] " of five hundred pounds a-year." * He further covenants to ſettle upon her, for an addition to her jointure, an annuity of two hundred and fifty pounds a-year during her life; and that five thouſand pounds of her fortune ſhould be laid out in land, wherein ſhe was to have the term of her life for her jointure, or the intereſt of the money until the land ſhould be bought from and after her huſband's deceaſe. The marriage took effect, the portion was paid, and about two thouſand pounds laid out in preſents. *Gilbert* the late earl, immediately after his marriage, deſired one *Charles Parſons* to conſult with his ſteward what lands were the propereſt to be ſettled in purſuance of theſe articles; and upon a diligent ſearch into his eſtate, and the ſettlements of the family, they could find no other manor but that of *Woolvey* proper to be ſettled, and that was but four hundred pounds a-year. This ſteward leaving his lord's ſervice, and dying quickly after, occaſioned further delay, the new ſteward being for ſome time unacquainted with the concerns of the family. But *the Earl* often expreſſed great uneaſineſs at this delay. And afterwards, upon looking for another manor to make up the five hundred pounds a-year, they pitched upon one that had an incumbrance upon it that was neceſſary to be firſt cleared. But however, at laſt, inſtructions were given and ſent to *London*, to be laid before Counſel, for preparing a draught purſuant to the articles. The draught was prepared, engroſſed, and ſent down to *the Earl*, to be by him executed in the country. *The Earl*, after the engroſſment of the deed, being told what lands were to be ſettled by this deed, approved of their choice; but the actual execution of the ſettlement was prevented, once by an accidental viſit of *Mr. Sandys*, afterwards by illneſs, and at laſt by the ſudden death of *the Earl*. When *the Earl* expreſſed his uneaſineſs upon
*[466] the diſappointments he had met with in making this * ſettlement, he was told by Counſel, he might be very eaſy; for that if he ſhould die, a court of equity would eſteem it as done. At the time when *the Earl* made his will, which was the day he died, there was a man and horſe ſent to the ſteward, who happened to be fifty miles off, and had the keys of the place where the engroſſed deed lay; but

But before the ſteward could come, *the Earl* died. By the will he gave his wife, over and above what was agreed to be ſettled upon her by the marriage-articles, a legacy of three thouſand pounds. The defendant *Lady Anne Carew*, daughter of *the Earl* (who died without iſſue male); and executrix of his will, ſwore in her anſwer, that in caſe the five hundred pounds a-year was to be ſlung as a burthen upon the perſonal eſtate of her father, there would not be aſſets enough to anſwer all the demands of the plaintiff.

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SIR ROBERT RAYMOND, SIR PHILIP YORKE, SERJEANT CHESHYRE, and MR. MEAD, *Counſel for the plaintiff*, and the defendant *Lady Anne Carew*, who joined with the plaintiff in order to throw the burthen off the perſonal eſtate, argued, that theſe ſorts of powers receive always in a court of equity a large and favourable conſtruction; being powers given to thoſe who, had it not been for ſuch ſettlements, in which theſe powers are contained, would have been tenants of the fees themſelves. This was uſed as a reaſon, by *Chief Juſtice* HOLT, for a large interpretation of theſe powers, in the caſe of *Sir Charles Orby v. Lord Mohun*, in LORD COWPER'S time. It was obſerved, that theſe marriage articles want but one circumſtance, *viz.* a certainty of the lands, to make them, in point of law, a perfect execution of the power; but that this defect, *viz.* want of certainty, was now remedied, at leaſt in equity, by * the ſteps that had been taken, in the moſt ſolemn and deliberate manner, towards the execution of this ſettlement. It was ſaid, that a court of equity will look upon a thing covenanted to be done, and intended to be done, as done; and in caſe of a legal defect in the execution of it, aid and aſſiſt that defect: but indeed this muſt be underſtood of ſettlements, executions of powers, &c. founded upon valuable conſiderations, not voluntary ones. The preſent caſe is the caſe of a jointure, which is always favoured, becauſe it comes in lieu of dower. The caſe of *Onions v. Tyrer (a)* was a caſe before LORD COWPER, where a former will appearing to have been cancelled for no other reaſon but becauſe the teſtator thought he had made another to the ſame effect, which proved not to be duly executed, it was determined, that equity would ſet up the former will again. In the caſe of *Parker v Parker (b)*, a man having power to charge lands for younger children, by a writing under his hand, atteſted by three witneſſes, did in fear of ſudden death, and being abſent from home, by a paper atteſted by two witneſſes, charge his eſtate with ſeven thouſand pounds for his children; and this defect was ſupplied, becauſe occaſioned by his being abſent from home, and ſo not being able to have a ſight of the deed where this power was contained. In the caſe of *Smith v. Aſhton (c)*, the power was to charge lands, by deed or will in writing under hand and ſeal; the deed in which this power was, was a voluntary one; and in the execution of this

* [467]

(a) 2. Vern. 741.
(b) Rep. Eq. 168. cited Stra. 604. — See alſo Thwaites v. Day, 2. Vern. 80. and Powel on Powers, 189.
(c) 2. Ch. Caſes, 264.

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power, the circumſtance of a ſeal to the will was wanting; yet this defect was aided. For circumſtances are but cautions to prevent impoſition, the ſubſtantial part is to do the thing; and therefore when it is clear and indubitable that the thing was deſigned to be done, the neglect of circumſtances ſhall not avoid the act in equity. * In the caſe of *Hele v. Hele* (*a*) it was ſaid, that if *de facto* the
* [468] power had been executed, equity would have ſupplied the defects; for circumſtances are only annexed to powers to prevent frauds. In the caſe of *Peach v. Winchelſea* (*b*), LORD COWPER ſeemed to be of opinion, that in caſe of a covenant to convey land, the money being paid, a judgment confeſſed to a creditor, between the time of the covenant and the conveyance, ſhould not affect the purchaſer; becauſe in equity the land is eſteemed to be ſold from the time of the covenant. *Juſtice* POWELL, in his argument in the caſe of *Bath v. Mountagu* (*c*), admits, that even in caſe of a revocation, which is not ſo much favoured, a court of equity may interpoſe in a caſe of diſability; as if the *Duke of Albemarle* had taken the deed over with him to *Jamaica*, and there, having an intention to revoke it, had gone as far as he could, by making his will with ſix witneſſes, that this ſhould have been made good, though none of the witneſſes were peers, becauſe of the diſability he was under to get peers. It was argued, that though poſſibly it might be objected that the preſent caſe did not come directly within the authority of the caſes quoted, becauſe here the plaintiff did not come into equity to eſtabliſh a conveyance already executed, and only attended with ſome trivial legal defect, but to ſet up a conveyance that had not been at all executed; yet it did within the reaſon of theſe caſes; for all the preparations that were from time to time taken, in order to the execution of it, manifeſt as fixed and reſolved an intent to have executed it, as if it had actually been done. And to ſpeak properly, a deed or power executed but defectively in ſome legal circumſtance, is really not executed in point of law at all; ſo that in that caſe, a court of equity may be ſaid to ſet up a conveyance not executed, becauſe in point of law
* [469] the whole execution is null and void. * Had this draught engroſſed been a will, it had been a good will within the ſtatute of 32. *Hen.* 8. c. 1. and before the ſtatute of Frauds; for that ſtatute does not require the will to be of the hand-writing of the teſtator, but only to be reduced to writing by his direction. A covenant to ſell and convey is ſo far conſidered in equity, as that the Court will compel the heir to join in the ſale, though this be to his diſinheriſon; for the money will go to the executors. It is true, that where a tenant in tail contracts for the ſale of land, and dies before execution, the Court will not carry this into execution againſt the iſſue. But the reaſon of this is, becauſe it is contrary to the intention of the firſt donor, who deſigned, as the ſtatute *de Donis* ſays, that the eſtate ſhould remain in the blood, &c. But yet if a tenant in tail, having a power to make leaſes for three lives,

(*a*) 2. Ch. Rep. 29.
(*b*) 18. Viner Abr. 318.
(*c*) 9. Mod. 14.

ſhould

ſhould covenant to make ſuch a leaſe, and die before execution, the Court would carry this into execution againſt the heir, though they would not a ſale. The caſe of *Barkham v. Barkham* was a caſe in the LORD SOMERS's time, wherein he decreed a defective jointure to be made good againſt thoſe that claimed under a marriage-ſettlement, and within the conſideration of the marriage-ſettlement. There may poſſibly be caſes where a court of equity has refuſed to do this, *viz.* to ſupport or make good conveyances defective in ſome legal circumſtance; but then this has been when it was demanded in favour of voluntary proviſions. This five hundred pounds *per annum* jointure is but a ſmall incumbrance in compariſon of what the eſtate of the preſent earl is able to bear; and he is one that will be the leſs favoured in this court, upon account of his being a volunteer. * It was further urged, that as accident is one great branch of the juriſdiction of this court, no caſe could ever come before it attended with more and ſtranger incidents of this nature to be entitled to relief, than the preſent. The great difficulty of finding out lands free from thoſe incumbrances mentioned in the original power, death of the ſteward, fear to come up to *London* on account of the ſmall-pox, the accidental viſit of *Mr. Sandys*, the illneſs of *the Earl*, his lady's tenderneſs, for his health not ſuffering him to be diſcompoſed by buſineſs, and the ſuddenneſs of his death when the phyſicians thought him out of danger, are all ſo many accidents concurring to prevent the execution of this deed, and which cry for relief in this court. It was likewiſe ſaid, that the opinion of Counſel in this caſe would be conſidered as a favourable circumſtance, who all informed *the Earl*, he need not be uneaſy; for if he died, a court of equity would conſider this deed as executed.

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* [470]

MR. COWPER, *Counſel for the preſent Earl.* The queſtion here is not, whether a court of equity will ſupply ſome ſlight defects in the execution of a power, but whether this court will entirely ſupply a non-execution; and that in favour of a perſon not without remedy. For ſhe has a covenant that binds the heir at law, and the perſonal eſtate that the heir as executrix is intitled to; which, we ſay, will, upon inquiry, be found to amount to two thouſand pounds over and above the five thouſand pounds covenanted to be laid out in land (wherein the plaintiff is only to have her life), and the two hundred and fifty pounds annuity. So that it cannot be pretended, that in this caſe here is any want of proviſion; there is one almoſt adequate to the fortune, though ſhe ſhould not ſucceed in what ſhe now prays againſt the preſent earl.

* *Chief Juſtice* HOLT, in his argument in the caſe of *Bath v. Mountagu*, ſtrongly inſiſts upon it, as a fixed and ſettled point in law, that powers are to be ſtrictly purſued; becauſe created by the owner of the land, in which caſe *ſtat pro ratione voluntas.* When a court of equity decrees conveyances to be made and powers to be executed, it is always in caſes attended with circumſtances of ſuch weight as to make it appear fit and proper to be done in the judgment of mankind; and without ſuch circum-

* [471]

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power, the circumſtance of
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ſurrender in the caſe of a wife provided fo

the caſes quoted for the plaintiff be re-conſidered, ſome
cumſtances will be found attending upon them as will turn them
into ſo many authorities in favour of this earl now defendant.
As to the caſe of *Smith v. Aſhton* (*b*), *Chief Juſtice* HOLT takes
notice of it, in his argument in the caſe of *Bath v. Mountagu*; and
according to him, the indulgence a court of equity ever ſhews to
proviſions made for younger children was the chief ingredient in
* [472] the caſe. * Beſides, one very material circumſtance, as it is
reported in 1. *Chane. Caſes*, 265. was omitted, when quoted by the
Counſel for the plaintiff, which was, that an iſſue was directed to
be tried at law, Whether ſuch notes in writing were part of the
laſt will of *Ralph Aſhton*? and being found by the verdict to be his
will, and in favour of younger children thus provided for, the Court
decreed the power well executed, though the circumſtance of
ſealing was wanting. But is this an authority that the Court
ſhould in the preſent caſe, in favour of one ſo amply provided for
otherwiſe, decree the execution of a power *ab origine*, where it was
Ante, 468. not executed at all? As for the caſe of *Hele v. Hele*, it is indeed the
caſe of a jointure, but as there is no decree in it, the authority of it
cannot be great; and the Counſel in quoting it ſeemed to make
uſe of it under the head of accident. But certainly the pretence
the plaintiff ſets up to be relieved in this court, under the head of
Ante, 470. that branch of the juriſdiction of it (Accident), is the moſt ground-
leſs in the world. The articles were made in the year 1715,
the Earl died in 1719, four years and a half intervene, and yet,
according to them, it muſt be eſteemed an accident that he died
before he could make the ſettlement in purſuance of the articles;
and to ſupport this part of the caſe, the evidence gives us a hiſtory
of his ſteward, his gout, the doctor, and the bath. If it muſt be
looked upon as an accident that a man dies in four years, why not
in eight? nay, in eighty? I know not where to put the bounds.
Were it proper or convenient to enter into the particular circum-
ſtances of this noble family, it would appear, that the preſent earl

(*a*) 1. Eq. Abr. 123. 1. Salk. 18. 263. Finch C. R. 278 1. Freem. 38.
(*b*) 1. Eq. Abr. 345. 1. Chan. Caſes, 3. Salk. 277.

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[illegible] the caſe of *Bath v. Mountagu*, where [illegible] power of revocation, upon the tender [illegible]ning under a latter ſettlement made [illegible]vocation, could not prevail to ſet [illegible] court of equity, for want of being [illegible]ce of the tender of a guinea; [illegible] to have it tried, revoked or [illegible] was ſo fortunate as to prove [illegible] to ſell (*b*), received the [illegible] not ſuffering a common [illegible] doing of it; yet this [illegible] It is ſaid indeed, that Ante, 469. [illegible] of the intent of the [illegible] might have held at [illegible]be ſaid with any [illegible] il muſt be pre- [illegible]ges. And as [illegible]uſt be pre- [illegible]ant in tail [illegible]s to the * [477] [illegible]s court [illegible] it is [illegible]ner [illegible]re

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third perſon, the remainder-man.
that *what* is now deſired of the C[illegible]
be exerciſed by this Court as the circ[illegible]
caſe ſhall direct. The caſe of *Piggot* [illegible]
COWPER's time, in the year 1717, was th[illegible]
power, in a ſettlement ſhe had made in favour o[illegible]
revoke the uſes and limit new ones, writes to one to p[illegible]
to revoke the uſes, and ſettle the ſame upon ſuch a relati[illegible]
which letter ſhe takes notice of this power in the ſettlement th[illegible]
did enable her ſo to do. Falling ill, ſhe ſends another letter [illegible]
preſſing the preparing of this deed, for that it was her abſolute [illegible]
will to revoke the uſes, and give her eſtate to this relation. In
this caſe the Court declared, that they would not interpoſe; that
they muſt judge by what ſhe had done, not by what ſhe intended
to do. Had ſhe been hindered from the exerciſe of this power by
the act of her huſband, then, the Court ſaid, they would have in-
terpoſed. So poſſibly in this caſe; had the execution of this power
been prevented by the art and contrivance of the preſent earl, it had
been a reaſonable ground for this Court to interpoſe.

* MR. TALBOT. It muſt be admitted, that the limitation by which the preſent earl enjoys is a voluntary conveyance: but then it muſt be conſidered, that he claims under the will of the father of the late earl; and ſo by a title paramount to that of the late earl, who was himſelf a volunteer; and then I do not ſee, how one volunteer deſerves more favour than another. It is ſaid, that the preſent earl claims under a limitation clogged with this power, which is true. And had *Earl Gilbert* been pleaſed to execute that power, which he was perfectly at liberty to do or not, the preſent earl muſt have ſubmitted to it; but ſince the power is unexecuted, it is juſt the ſame as if there had been no power at all ever created. The executing, or not executing, of this power was a mere contingency; and as *the Earl* muſt have been bound, if the leſs favourable contingency had happened, it is very reaſonable that ſince the more favourable contingency has happened, he ſhould enjoy the benefit of it. The eſtate of the preſent earl is already clogged with two conſiderable jointures now ſubſiſting, and other * [474] Ante, 496.

(*a*) Comy. 250. Prec. Ch. 471. Gilb. Rep. 137. 9. Mod. 15.—See alſo Powel on Powers, 157.

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Ante, 466.

incumbrances; ſo that were the intention of the creator of this power of any weight, it is very probable he would not chooſe to have the eſtate of the family incumbered at once with ſo many jointures, which does not ſo well anſwer the end propoſed by him in creating the intail, *viz.* the ſupporting the honour and dignity of the family. It has been ſaid, that theſe articles are, even in point of law, an execution of the power. If this were ſo, the plaintiff muſt take her remedy at law, not in equity. But there is not the leaſt colour for this. For it plainly appears, from the wording of the articles, that however it might be primarily and originally the
* [475] intention of the parties to have made this ſettlement, in * purſuance of the power in the will, yet that they never intended to confine and reſtrain themſelves to it. The covenant is, "that *Earl* "*Gilbert*, or his heirs, at the requeſt of the lady's father, &c. "ſhall, by deed indented, &c. according to the power reſerved by "the will of the ſaid earl's father, or otherwiſe, ſettle, or procure "to be ſettled, lands of the value of five hundred pounds *per annum*, "for her jointure." The words "or otherwiſe" ſet the articles looſe and at large as to the power; for it is very evident that the ſettling of any lands, though not within the power, would have been a good performance of the articles. The covenant is, that *Earl Gilbert* or his heirs ſhall do it; ſo that if the heir did it, it would be a good performance of the articles: but it is impoſſible, that a power given to any perſon claiming under that ſettlement to jointure his wife, can be an authority for a ſon (the heir) to jointure his mother. It is ſaid, the plaintiff is a purchaſer: it is true, ſhe is ſo, but of what? Not of any lands comprized in the will of *Earl Thomas*, and to which this power extends. All that ſhe is a purchaſer of is a right to a jointure; and as a ſecurity for the performance of it, ſhe has relied upon the perſonal covenant which binds *Earl Gilbert* and his heirs; and if there are aſſets ſufficient for that purpoſe, theſe are proper to be applied in ſatisfaction of this covenant. And to make the largeſt and moſt favourable conſtruction for her, ſhe can only be eſteemed a purchaſer with reſpect to us *pro tanto* as the aſſets fall ſhort of this five hundred pounds *per annum*. It has been ſaid, that whatever a man does not give away from himſelf remains in him; and that whatever powers are reſerved by the donor (being part of the old dominion he had over his own eſtate) ought to receive a large and benign interpretation. This rule, though true, is not applicable to the preſent caſe; for the perſon againſt whom this power is deſired
* [476] to be executed is one that receives his eſtate from * the ſame bounty that he who ſhould have exerciſed it did; and conſequently, ſince both claim under the ſame title, and from the ſame donor, the one cannot challenge more favour than the other. It is a matter of the higheſt importance, that rules of law, the boundaries and fences of property, ſhould remain fixed and ſettled, and be never broken in upon but with very good reaſon, and that too as ſeldom as poſſible; and conſequently, a court of equity will not be forward
2. Vern. 69. to do it in favour of volunteers. Therefore in the caſe of *Arundel v. Philpot*,

v. Philpot (a), mentioned in the caſe of *Bath v. Mountagu*, where there was a ſettlement, with a power of revocation, upon the tender of a guinea; the plaintiff, claiming under a latter ſettlement made in purſuance of this power of revocation, could not prevail to ſet aſide the firſt ſettlement, even in a court of equity, for want of being able to prove that little circumſtance of the tender of a guinea; but being a volunteer, was ſent to law to have it tried, revoked or not revoked. Indeed, at law, the party was ſo fortunate as to prove the tender. Tenant in tail covenanted to ſell (*b*), received the money, ſtood in contempt to this court for not ſuffering a common recovery, and died in contempt, without doing of it; yet this Court would not compel the iſſue to do it. It is ſaid indeed, that the reaſon of this is, becauſe it is in derogation of the intent of the donor. But this, though ſpecious, and what might have held at the time of making the ſtatute *de Donis*, cannot be ſaid with any reaſon at this day; for whoever gives an eſtate-tail muſt be preſumed to intend to give it with all the legal advantages. And as everybody is preſumed to know the law, the donor muſt be preſumed to know, that by proper ways and methods the tenant in tail may diſpoſe of his eſtate, and be willing he ſhould. * As to the power exerciſed by this court in marſhalling of aſſets; this court never does it in favour of a reſiduary legatee; and where it is done, it is done for the ſake of paying debts, and in ſuch a manner as the creditors might have done themſelves; and therefore where the heir at law can have no reaſon to complain.

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Ante, 469.

* [477]

IT WAS REPLIED *for the plaintiff*, that notwithſtanding what has been ſaid to the contrary, this is a favourable caſe, being that of *a lady* who brought a great portion into the family, and will otherwiſe be ſtripped of a great part of that jointure ſhe covenanted and paid a valuable conſideration for. As to the objection raiſed from thoſe words in the covenant "or otherwiſe," it is capable of two anſwers: FIRST, That it is a common caution or phraſe made uſe of by conveyancers to prevent any danger that may ariſe from miſtakes or miſrecitals; or, SECONDLY, It may relate to the manner or form of the conveyance; for it is very improbable that it ſhould relate to lands not comprehended in the power, the earl at that time having no other. In the caſe of *Smith v. Aſhton (c)*, the doctrine is fully laid down, that circumſtances annexed to the execution of powers are but in the nature of cautions to prevent ſurprize; and therefore when the intent is plain, a court of equity will diſpenſe with them. And as that caſe is quoted by MR. JUSTICE POWELL, in the caſe of *Bath v. Mountagu*, it is entirely put upon the accident of death preventing the execution of the power. The caſe of *Hele v. Hele (d)* was a caſe of a non-execution of a power; and though there was no decree, yet THE LORD CHANCELLOR, by directing the plaintiff to amend a fault

Ante, 467. 471.

Ante, 468. 472

(*a*) 2. Vern. 69.
(*b*) Lanyon *v.* Williams; Weale *v.* Lower; Powell *v.* Powell.
(*c*) 1. Ch. Caſes.
(*d*) 2. Ch. Rep. 29.

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discovered in the bill, plainly declared what his sense was. * The distinction has always been taken between settlements perfectly voluntary, and those founded upon a valuable consideration. MR. COWPER has indeed advanced another, of provision and no provision; but cited no case in maintenance of this distinction. In the case of *Smith v. Ashton* (*a*) there was a collateral provision; and so it is an authority against that distinction. Indeed, in cases of voluntary conveyances the Court has thought the matter of provision or no provision fit to be regarded; but never in conveyances founded upon a valuable consideration. As to the objection, that had this power been reserved to the party himself, it would have received a large interpretation, but being to a remainder-man it must have a strict one; it may be answered, that this is a power reserved to a son, who without this settlement, being heir at law, would have had the whole fee in him; and therefore is intitled to the same favour; which is a reason allowed of in the case of *Sir Charles Orby v. Lord Mohun* (*b*). Indeed, as to the case itself, it was said to be fit to be left to the law; because a voluntary and peevish execution of the power. The cases of *Pigot and Penrice* (*c*), and *Arundel v. Phelpot* (*d*), were cases relating to powers of revocation, not so much favoured by this court, and voluntary; so that though the Court denied relief, they did it upon grounds that we admit of. As to the case of tenant in tail, it is contrary to the intention of the donor, at least the primary one; though the law gives the tenant a power to defeat this intention in a proper manner. It is contrary to the statute *de Donis*, made in support of this intent of the donor; and though this statute has been so expounded, as that by feigned actions, &c. yet if that particular way chalked out by the law be not complied with, a court of equity may refuse to interpose. * In the case of *Lady Clifford v. Earl of Burlington* (*e*), *Lord Clifford* had a power to limit a jointure of one thousand pounds *per annum* on lands in *Ireland*. Upon his marriage he covenanted accordingly to settle a jointure of one thousand pounds *per annum*, sends to his steward in *Ireland* for particulars, which were sent, and the conveyance made; but after his death it was found, that the lands did not amount to more than six hundred pounds *per annum*. A bill was brought against the remainder-man to have the jointure completed; and decreed by SIR NICHOLAS WRIGHT against the remainder-man. That clause in the will of *Earl Gilbert*, wherein he gives her three thousand pounds over and above what was settled upon her by the articles, is a plain proof that he did look upon the articles as a good execution of the power by way of appointment. As to what was said, that this case cannot fall under the head of accident, because *the Earl* lived so long after the marriage; it is easy to answer, that four years or more may be as much apologized for and

Ante, 475.

Ante, 473. 476.

Ante, 476.

*[479]

2. Vern. 379. 1 Rep. of Cases in Equity, 167.

Ante, 466.

Ante, 472.

(*a*) 1. Eq. Abr. 345. 1. Ch. Cases, 263. Finch C. R. 273. 1. Freem. 308. 3. Salk. 277.

(*b*) 3. Ch. Rep. 64.

(*c*) See Powell on Powers, 157. 160.

(*d*) 3. Ch. Cases, 70. Powell on P. 256.

(*e*) 2. Vern. 379.

covered

covered by accidents as one; and whether the present case be not such a one, must be submitted to the Court upon the evidence.

LADY COVENTRY against THE EARL OF COVENTRY AND LADY ANNE CAREW.

PARKER, *Lord Chancellor.* As to the five hundred pounds a-year, the *Lady Coventry* has certainly a very strong and a very favourable case; there can be no question whether, though there may from whence, she ought to have it. It does not appear to me, but that the heir at law may literally perform this covenant; and then the controversy will be only between the present earl and the heir at law. I do not believe the defendant in her answer looks upon the five thousand pounds deposited for a purchase as assets; whereas the plaintiff being intitled to interest only for her life, the reversion is assets. * Suppose the plaintiff had brought her action at law, upon her covenant, against the heir at law; it deserves to be considered, whether the heir at law could have come into this court to have been relieved against the remainder-man, and to have had this land settled in ease of his personal estate, and discharge of the covenant laid on him by the ancestor. It is absurd to imagine, that the words "or otherwise" should relate to the manner of the conveyance; or that the settling of other lands, to the value of five hundred pounds a-year, than those comprehended in the power, would not have been a full performance of the covenant. And it is impossible that the heir making a settlement upon his mother could be supposed acting in pursuance of a power enabling a man to settle land upon his wife for her jointure. This is a case of great importance. Marriage-settlements and executions of powers are of daily use; and therefore I shall be very cautious of making precedents. I will not determine it without the assistance of some of the Judges; in the mean time I will direct an inquiry into the assets, that so I may know how far *Lady Coventry* is concerned in the question. The present earl being only tenant for life, no decree that I can make will bind the issue; and therefore it is more safe for *the Lady* to have a satisfaction out of the assets upon the covenant, if there be enough to answer all her demands.

* [480]

N. B. When the cause came on again, the Judges that the Lord Chancellor called to his assistance were of opinion, that the marriage-articles entered into by *Earl Gilbert*, together with the deed of settlement drawn by his direction in pursuance of the said articles, was such an execution of the power reserved in the will of *Earl Thomas* his father as was binding in equity.

And accordingly IT WAS DECREED, that the plaintiff should have * for her jointure the lands mentioned in the said intended settlement.

* [481]

Hill

Caſe 225.

Hill *againſt* Filking and his Wife.

A devise of lands to a *Roman* catholic who is under eighteen years of age at the death of the teſtator, and conforms within ſix months after attaining that age, purſuant to 11. & 12. *Will.* 3. c. . is a good deviſe.

S. C. poſt. 536.

S. C. 9. Mod. 354.

S. C. Caſes Ch. 22.

S. C. 2. Peer. Wms. 6.

S. C. 2. Eq. Abr. 622. 624.

A GRANDMOTHER having no children, but only a grandſon and granddaughter, and being a *Roman catholic*, ſhe made her will on the 8th of *May* 1716, by which will ſhe deviſed her eſtate to three truſtees, whereof two were *Roman catholics*, the third a *proteſtant*. She deviſed the eſtate to be ſold for the payment of her debts; gave a hundred pounds legacy to her grandſon, who was her heir at law; and directed that the ſurplus ſhould be paid to her granddaughter, at her age of twenty-one or marriage, provided ſhe married with the conſent of the two popiſh truſtees, the proteſtant truſtee being to be unconcerned in that affair. Having made this will, ſhe died in *July* 1716. In *Auguſt* 1717 the granddaughter married a proteſtant, by the conſent of the popiſh truſtees. At the time of the death of the grandmother, the grandſon was but nine years of age, and educated in the *Roman* catholic religion. The granddaughter, at the time of her marriage, was fifteen, and likewiſe educated a papiſt, and profeſſed that religion at the time of making the will, and of the death of the grandmother, and at the time of the marriage. Both grandſon and granddaughter have ſince conformed, taking the oaths, &c. before they came to the age of eighteen.

It was the perſuaſion of witneſſes examined in the cauſe, that the true motive that prevailed with the grandmother to diſinherit her grandſon, her heir at law, and give her eſtate to the granddaughter, was, that the grandſon being but nine years of age, ſhe did not know but he might eaſily be brought up a proteſtant; but the

* [482] * granddaughter being fourteen years of age, and ſo better grounded in her principles, ſhe hoped would firmly adhere to the *Roman* catholic religion.

Though the popiſh truſtees conſented to the match, and that with a proteſtant, yet nothing was ſettled upon the wife but barely her own fortune; and that too ſubject to a power of revocation by the huſband and the popiſh truſtees.

The queſtion now before the Court was, Whether this deviſe to the granddaughter was not void by the 11. & 12. *Will.* 3. c. , and ſo the grandſon intitled to have the truſt of the reſidue, decreed to deſcend on him, as heir at law, and having taken the oaths, &c. as that act requires, within ſix months after the age of eighteen?

This point depends upon two clauſes in that act. The firſt clauſe enacts, "That from and after the twenty-ninth of *Septem-*
" *ber* 1700, if any perſon educated in the popiſh religion, or pro-
" feſſing the ſame, ſhall not, within ſix months after attaining the
" age of eighteen, take the oaths, &c. ſuch perſon ſhall, in reſpect
" of himſelf only, but not in reſpect of his heirs or poſterity, be
" diſabled and made incapable to inherit or take by deſcent, deviſe,
" or limitation, in poſſeſſion, reverſion, or remainder, any lands,
" tenements, or hereditaments; and that during the life of ſuch
" perſon,

"perſon, or until he or ſhe ſhall take the ſaid oaths, &c. the next "of his or her kindred, which ſhall be a proteſtant, ſhall have "and enjoy the ſaid lands, &c. without being accountable for the "profits."

The ſecond clauſe enacts, "That from and after the tenth of "*April* 1700, every papiſt, or perſon making profeſſion of the "popiſh religion, ſhall be diſabled and made incapable to purchaſe "either in his or her own name, or in the name of any other per-"ſon or perſons to his or her uſe, or in truſt for him or her, any "manors, lands, profits out of lands, tenements, rents, terms, or "hereditaments, &c."

* IT WAS ARGUED *for the grandſon*, the heir at law, that it cannot be diſputed ſince the caſe of *Roper v. Radcliff (a)*, that though the eſtate be deviſed to be ſold for the payment of debts, yet as to the *reſiduum*, it muſt be conſidered as a deviſe of land. It muſt likewiſe be admitted ſince that caſe, that the word "pur-"chaſe" in the ſecond clauſe does include deviſes, and all manner of ways of coming to eſtates in oppoſition to deſcent; and conſe-quently, that if the granddaughter be a perſon that falls under the ſecond clauſe, this deviſe to her would be void. As to the deſcrip-tion of the perſons to which the word "purchaſe" in the ſecond clauſe does relate, it is only a papiſt, and one profeſſing the popiſh religion. And certainly the granddaughter, who is proved to have been educated in, and to have profeſſed the popiſh religion at the time when the will was made, when the teſtatrix died (the time when the right to the *reſiduum* veſted, though it was to take effect *in futuro*, viz. at the age of twenty-one or marriage), nay at the time of the marriage, and ſo zealous in her religion as to declare ſhe would be torn to pieces by wild horſes before ſhe would turn *heretic*, muſt be eſteemed one that comes within the deſcription in the act, "a papiſt, or perſon making profeſſion of the popiſh "religion." And though ſhe has ſince conformed, yet ſince ſhe did not do ſo at the time when the teſtatrix died, the time when her intereſt veſted, the ſubſequent conformity will not replace that intereſt which is now veſted in another. All this is ſo plain, that it could not in the leaſt be controverted, were the queſtion ſingly to be determined upon this clauſe. But it may be objected, that there is another clauſe in this act, and care muſt be taken that ſuch an interpretation be put upon both theſe clauſes as to make them conſiſt with one another, which I own muſt be done; but the * putting of this conſtruction upon the ſecond clauſe will not con-tradict anything enacted by the firſt. For whoever conſiders the act well will find, that the law-makers intended, by the firſt clauſe, to have regard to the eſtates that then were in being. And as to theſe it is plain, that the act never intended to break in upon, or interrupt the courſe of, the deſcent; but only to create a temporary incapacity or diſability of taking the profits, removeable

* [483]

* [484]

(*a*) Ante, 93. 234.

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by conformity before ſuch an age. And though the word "deviſe" be in that clauſe, yet it muſt be underſtood of ſuch deviſes as are deſigned to prevent the deſcent; and conſequently muſt relate to ſuch deviſees who, being heirs at law, would have taken by deſcent had it not been deviſed to them. And had they not done this, they had done nothing; for the act might have been evaded with all the eaſe imaginable. As by the former clauſe the ſtatute provides for eſtates then ſubſiſting, by the ſecond it intended to provide againſt all new acquiſitions by perſons profeſſing the *Roman* catholic religion. And here the legiſlators thought it reaſonable to provide againſt this, not by creating, as in the former, a temporary incapacity, removeable by conformity, but a total and abſolute incapacity to take at all. As the granddaughter appears thus plainly to have been within the deſcription of the laſt clauſe, ſo it is no leſs plain, that the grandſon, being heir at law, has, by his conformity within the time preſcribed by the act, in the firſt clauſe of it, put himſelf in a capacity of taking by deſcent, as heir at law.

IT WAS ARGUED *in favour of the granddaughter*, that the great deſign of this act of parliament was to encourage *Roman catholics* to turn *proteſtants*, by making it their intereſt ſo to do: whereas this interpretation would be a great diſcouragement; ſince by turning they were to receive no advantage. And therefore it was
* [485] * inſiſted, that ſince this laſt clauſe was in that reſpect more ſevere, and created a total incapacity, without reſtoring them upon their conformity, it ſhould not be extended to any that could poſſibly come within the former; and that therefore, as the firſt clauſe reſpected perſons under the age of eighteen, ſo none ſhould be deemed perſons profeſſing the popiſh religion within the ſecond clauſe, but ſuch as were above that age at the time of the purchaſe: and that the firſt clauſe may extend to the granddaughter is plain, the words being "to take by deſcent, limitation, or deviſe."

PARKER, *Lord Chancellor*. The grandſon ſeems to me to have a ſtrong caſe. It is admitted, that the granddaughter is within the expreſs words of the ſecond clauſe; ſhe being proved to be a perſon profeſſing the popiſh religion at the time of the making the will, and of the death of her grandmother, and of her marriage. But it is ſaid, that this ſecond clauſe muſt, as to the perſons to whom it is to relate, be reſtrained by the firſt, ſo as not to extend to any comprehended in that clauſe; for otherwiſe, as the diſabilities created by theſe two clauſes are different in their nature, the one part of the act would contradict the other. The meaning of the firſt clauſe in this act has been very much miſtaken. It has been imagined, that this clauſe has relation to the age of the perſon at the time of the deſcent; whereas the act ſays nothing at all to that matter. For it is plain from the act, that the age of the perſon has relation entirely to the time of taking the oaths, &c. not of the deſcent: and therefore though, when the infant comes to the age of eighteen, the deſcent has not happened, yet then it is that the

time

time preſcribed by the act for qualifying, &c. commences, in order to become capable of what may hereafter deſcend to him. In caſe he ſlips this time, and * the land deſcends afterwards, the incapacity by the act takes place; nor is this any hardſhip, ſince he had it in his power, by a timely conformity, to have been capable of taking it. The firſt clauſe in this act of parliament has reſpect to old ſubſiſting eſtates; but whereas the law-makers plainly foreſaw, that if they ſhould only uſe the word "deſcend," the act would ſignify juſt nothing; therefore the words "limitation and deviſe" were added; the firſt to comprehend all thoſe eſtates where the preſent poſſeſſor being only tenant for life, the ſon in remainder was to take by limitation; the other of deviſe, to prevent the interrupting the deſcent, and ſo evading the act, by deviſing to the heir at law. The ſecond clauſe has relation to eſtates to be created *in futuro*. And as to theſe eſtates, the legiſlators thought it reaſonable to create not a temporal incapacity, removeable upon conformity by a certain age, but a total and abſolute diſability to take at all. From this view of the act of parliament it appears, that the words in the firſt clauſe, "deviſe and limitation," have a proper uſe and ſignification, without breaking in upon the ſecond clauſe; for they extend to all ſuch deviſes and limitations as are not made void by the ſecond clauſe, of which many inſtances could be given. And thus it appears, that the ſecond clauſe, being entirely diſtinct from the firſt, the age of eighteen is entirely immaterial. Even in the opinion of the Counſel for the granddaughter, the legiſlators did not think proper to lay perſons over the age of eighteen, and profeſſing the popiſh religion, under the temptation of turning proteſtants by giving them their eſtates upon conformity; and therefore the argument drawn by the Counſel for the granddaughter, from the intention of the legiſlators to encourage papiſts to turn proteſtants, by giving them their eſtates again, is of no force; for in the firſt * clauſe it was their intention, but in the ſecond moſt evidently it * [487] was not. The only remaining queſtion will be, to fix the time when a perſon may be ſaid to profeſs the popiſh religion; and this indeed will be extremely difficult, and perhaps impoſſible, upon account of the difference of capacity, education, &c. I can be ſure, that at one, two, or three years of age, a perſon cannot be ſaid to profeſs any religion at all, and conſequently not the *Roman*; ſo at eighteen and before I can be ſure, that perſons may profeſs the religion they are of, and conſequently the *Roman*. This the makers of the act plainly ſuppoſed, when they enacted, "That if "any perſon profeſſing, &c. ſhall not, within ſix months after "attaining the age of eighteen, &c." But for the exact bounds, it is impoſſible to fix them; and they muſt therefore be left to the diſcretion of the Judges, who will be very indulgent in this matter. The caſe is a new one; and therefore I will have the aſſiſtance of the Judges.

HILL *againſt* FILKING AND HIS WIFE.

But

Hill *againſt* Filking and his Wife.

But his lordſhip directed ſome iſſues at law, to bring the caſe more fully before the Court *(a)*.

(a) This caſe came on again in the month of *June* 1723, upon the amended bill, before King, *Lord Chancellor*, who decreed, contrary to the opinion of Lord Macclesfield, in favour of the defendant.—See S. C. poſt. 536. 2. Peer. Wms. 13. *notis.*

Caſe 226.

Mills *againſt* Eden.

Care of court of equity to ſee debts of the teſtator paid.

S. C. 2. Eq. Abr. 251.

EDEN being indebted to *Mills* in the ſum of five hundred pounds, for his better ſecurity confeſſed a judgment to him. In the month of *July* 1712, *Eden* made his will, and deviſed his land to truſtees to be ſold for the payment of debts, and died. The truſtees being dead, or refuſing to act, adminiſtration with the will annexed was granted to * the plaintiff *Mills*, as being the
* [488] largeſt creditor, and that by judgment. *Mills* brought this bill againſt the widow, and others of his creditors, to have an account of the eſtate, diſcover incumbrances, &c.

What was ſpecial in the caſe was this:

Eden made a ſettlement upon his wife after marriage, of the lands that were then his father's, in bar of dower and thirds; his father joining with him. The uſes in the ſettlement were to the uſe of his father for his life, then of the mother for her life, remainder to the uſe of *Eden* for his life, remainder to *Mary Eden* his then wife (the defendant) for her life, for her jointure in bar of her dower, thirds, &c. remainder, &c.

The father was alive at the time when the defendant *Eden* put in her anſwer, but died before the hearing of the cauſe. She by her anſwer waived this ſettlement, as being made after marriage, and not to take effect, in the original creation of it, immediately upon the death of her huſband, as the ſtatute about jointures requires; for the father might outlive the huſband, and in fact did ſo, and ſo might the mother; and though they are ſince dead, yet that will not make the jointure more binding.

She therefore inſiſted upon having her dower.

But the Lord Chancellor ſeeing in the caſe, that if ſhe waived this ſettlement, theſe lands would go to the heir at law, not ſubject to the payment of any debts, ſince it was never part of the teſtator's eſtate, the father outliving him; and that if ſhe was to have her dower, there would not be aſſets to pay (as the Counſel ſaid) five ſhillings in the pound; and ſo that the wife did this, in favour of the heir at law, to the prejudice of the creditors;
*[489] * he decreed, that ſhe ſhould take this eſtate for her life, under this ſettlement; but that ſhe ſhould aſſign it over in truſt for the creditors, who ſhould convey to her a third of the land of her huſband for her dower, free from incumbrances. He ſaid, that this

was

was no more than what was agreeable with what the Court does in other caſes; as in decreeing a judgment-creditor, who has his election at law to reſort for his ſatisfaction to either real or perſonal eſtate, to make ſuch an election as ſimple-contract creditors may not be defrauded (*a*).

Mr. Cock *againſt* Eden.

(*a*) See Sagittary *v.* Hyde, 2. Vern. 455. Percy *v.* Marſh, 2. Vern. 182. Lannoy *v.* Duke of Athol, 2. Atk. 466. 2. Fonblanque's Equity, 302.

Cock *againſt* Goodfellow.

Caſe 227.

WALTER COCK deviſes by his will one-third of his perſonal eſtate to his wife, the other two-thirds to be equally divided among his children, with the advantage of ſurvivorſhip, in caſe any of them died before they came of age. He made ſeveral, and among the reſt his wife, guardians of his children. He directed, that the eſtate of the children ſhould be placed out to intereſt, or other way of improvement, by the conſent of the majority of the guardians; and he further directed, that his wife ſhould have the advantage of the improvement of two-thirds of the eſtate of the children, without any account, for their maintenance; and that the intereſt of the other third ſhould go towards the increaſe of their fortunes. He makes his wife executrix, and dies in *Auguſt* 1712, leaving behind him a very conſiderable eſtate, both in money and the ſtocks.

A deed made by a trader two months before an act of bankruptcy committed, for ſecuring the fortunes of children out of truſt-monies in his hand, is good againſt the creditors.

S. C. 2. Eq. Abr. 100.

His wife proves the will, and takes poſſeſſion of the eſtate.

In *May* 1714, *Peter Vandermaſh*, one of the wife's brothers, died, and left in money to the children about * five and twenty hundred pounds, which money came into the hands of their mother.

* [490]

It was proved by the book-keeper, that immediately upon the death of the father, an account of the whole eſtate was taken, and an exact eſtimation made of what each child's ſhare came to; and that the accounts of every child, with the intereſt and income belonging to his fortune, were, with great exactneſs, kept ſeparate and diſtinct until the year 1719, when, upon caſting up the accounts, the whole eſtate belonging to the children was found to amount to about four and twenty thouſand pounds.

In *May* 1720, *Mrs. Cock*, the mother, treated of a match for her eldeſt ſon with a daughter of *Lord Trevor*; and by marriage-articles it was agreed, that five thouſand pounds ſhould be paid by the mother, *Mrs. Cock*, and five thouſand pounds by *Lord Trevor*, into the hands of truſtees, to be laid out in land, and ſettled in the uſual way of marriage-ſettlements. *Mrs. Cock* covenanted beſides, that ſhe would purchaſe a hundred pounds a-year, and ſettle it to the ſame uſes as the former, except the jointure.

About this time *Mrs. Cock* lays out about ten thouſand ſeven hundred pounds in a purchaſe of land of one *Scot*.

Mrs.

Cock against Goodfellow.

Mrs. Cock all this time carried on a very great trade. In *October* 1720, her brother *Vandermaſh*, in *Holland*, ſent her word, that though he had in effects more than enough to anſwer all demands, yet ſo great was the run upon him, occaſioned by the ſudden fall of credit in *Holland*, that unleſs ſhe would ſupply him immediately with money and credit to the amount of forty thouſand pounds, he could not ſtand it.

Mrs. Cock complied with his deſire; but at the ſame time, *viz.* the nineteenth of *October* 1720, ſhe makes a deed, wherein, taking notice of the will of her huſband, and what was left thereby to her children, and of the will of the uncle, and what he left them, and of the ſum that appeared due to the children upon an account taken in the year 1719, and of the marriage-articles of her ſon, by which
*[491] five thouſand pounds was to have been paid to * truſtees for, &c. and a hundred pounds a-year purchaſed, &c. ſhe covenants that, for the better ſecuring what thus appeared to be due to her children, ſhe would immediately transfer to truſtees, &c. all that ſhe had in the ſeveral funds; and whereas the books of the *South-Sea Company* were then ſhut, ſhe declares, that as to the *South-Sea* ſtock, ſhe was but a nominal truſtee for her children, the ſtock having been bought with their money; and that as ſoon as the books were open, ſhe would transfer, &c. And in the ſame deed, the eſtate that ſhe had for her life was conveyed to the truſtees for ninety-nine years, if ſhe ſhould live ſo long, as a further ſecurity for her children: the eſtate likewiſe purchaſed by her of *Scot*, with a view, as ſhe ſaid, to have made good the marriage-articles of her ſon, was conveyed to truſtees for that purpoſe. The truſtees (the children's demand ſatisfied) were to ſtand ſeiſed of the ſurplus to the uſe of the mother. All the ſtocks that were transferrable were transferred next day.

The ſixth of *December*, *Mrs. Cock* became a bankrupt; the children of *Mrs. Cock* bring their bill to have this deed eſtabliſhed, and to have the preference of *Mrs. Cock's* creditors.

IT WAS ARGUED *in favour of the children*, that this deed being made two months before any act of bankruptcy, and for ſecuring that to which the children had a juſt demand, was a good deed. It was ſaid, if the ſpecific aſſets of her huſband and brother had remained in her hands, unblended and unmixed with her own, and then this misfortune had befallen her, there could have been no queſtion, Whether the children's eſtate could be ſubject to the mother's debts? and therefore the queſtion can only ariſe from the mother's having blended and mixed thoſe aſſets belonging to her
*[492] children with her own eſtate and trade. * And ſince this was an act that it was impoſſible for the children to prevent, and from whence they could not receive the leaſt poſſibility of advantage, but might be very great ſufferers, the mother, if ſhe has been guilty of it, has broken the truſt repoſed in her. Now if the mother, being ſenſible of this, has by this deed endeavoured, as in juſtice and conſcience

conſcience ſhe ought, to prevent any inconvenience they might otherwiſe have been liable to, from that wrong ſhe had done them, in mixing their eſtate with hers, this, as it is an act of juſtice to her children, will be always favoured in this court. It would be very ſtrange to ſay, that if *Mrs. Cock* has been guilty of a breach of truſt, the aſſignees, who ſtand in her place, ſhall take advantage of it, when ſhe herſelf could not; and that in conſequence of this, the eſtate of the children ſhall be veſted in the aſſignees for their advantage. This deed has done no more for the children than poſſibly what, by a bill brought in this court, ſhe might have been compelled to. The caſe of *Taylor v. Wheeler* (*a*) was quoted, as a ſtrong caſe in favour of the children. There a copyholder in fee ſurrendered to the uſe of the mortgagee in fee; but before the preſentment of the ſurrender became a bankrupt. LORD COWPER, upon the queſtion brought before him, Whether the aſſignees of the commiſſioners of bankruptcy ſhould be preferred, or the mortgagee? decreed in favour of the mortgagee; becauſe the aſſignees ought not to be in a better caſe than the bankrupt, who was bound in equity by this defective conveyance. So in the ſame manner as to the ſtock transferred, *Mrs. Cock* being bound in law and equity; and as to that untransferred, in equity, the aſſignees who ſtand in her place muſt be ſo too.

COCK *againſt* GOODFELLOW.

2. Vern. 564. Salk. 449. Mortgagee or purchaſer precedent, though by defective conveyance, preferred before the aſſignees of the commiſſioners of bankruptcy.

* ARGUMENT *in favour of the aſſignees.* As to the accounts that were ſaid to be kept ſeparate and diſtinct; it was ſaid, that as theſe accounts were not binding on one hand with reſpect to the children, ſo on the other hand they ought not to prejudice the creditors. Theſe accounts were kept merely for the mother's ſatisfaction, and were entirely under her power. No part of the eſtate whatever ſpecificated by them to the children; and therefore they are not in the caſe. Then it was argued, that the deed was void from the time, nature, and end of it. As to the time; it was made but two months before an actual bankruptcy, which in all probability ſhe then foreſaw. As to the nature of the deed; there is in it *ſuggeſtio falſi*; for that part of it wherein ſhe ſays, that the ſtock was bought with her children's money, is entirely falſe; nor is the price mentioned at which the ſtock is bought. So likewiſe what ſhe ſays, that ſhe is but a nominal truſtee for them, is all falſe; for it does not at all appear, that this part of the eſtate, conſiſting in the ſtocks, was anyways appropriated to the children before this deed. Another badge of fraud in this deed is, that ſhe plainly appears to be putting every-thing out of her own power, and covering every-thing by it; for her eſtate for life in land is by it veſted in truſtees, as a further ſecurity for the children. As to the end of the deed; it is to give an undue preference to her children, who muſt be acknowledged to be creditors. And as far as the preference is undue, *pro tanto* it is to defraud the reſt of the creditors. And then this deed itſelf amounts to an act of bankruptcy; for it falls directly within the deſcription of 1. *Jac.* 1. c. 15. of a

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(*a*) 1 Eq. Abr. 122. 312. 2. Vern. 564. 2. Salk. 449.

COCK *against* GOODFELLOW.

* fraudulent deed, made on purpose to defeat or delay creditors. Besides, this deed is plainly a voluntary one; for she was at a perfect liberty whether she would or would not make it. And it is made to prevent that equality which in a court of equity is always accounted the greatest equity. As to the stock untransferred; it was said, that the assignees were within the common rule of equity; that having law and equity of their side, they ought to prevail against the children, who had an equitable right only. As to the case of *Taylor v. Wheeler* (*a*); it was said, that case differed from this. For first, there the money was lent upon that very security of the copyhold land; and there being an inchoation of a legal estate, complete *quoad* the mortgagor or surrenderor, there was, as LORD COWPER observed, a lien upon the land, and the mortgagee might have compelled a specific performance; which in the nature of the thing is impossible here, one hundred pounds stock being as good as another. And secondly, it did not appear, that the surrender was made upon a view of his becoming a bankrupt. As children will reap the greatest advantage from their parents undertakings, so it is reasonable that they should, at least as much as creditors, share in the misfortunes of their parents.

Ante, 492.

IT WAS REPLIED *in favour of the children*, that no deed could be a fraudulent deed, so as to amount to an act of bankruptcy within the statute 3. *Jac.* 1. c. 15. but what would be esteemed fraudulent against a purchaser, by 27. *Eliz.* c. 4. which it can never be said that this is. The deed in the statute 3. *Jac.* 1. c. 15. is supposed to be a deed of trust for the advantage of the bankrupt, and to avoid * the payment of debts; but this is a deed in trust for creditors, and for the payment of debts. Nor will the preference created by this deed make it fraudulent. For an executor may by law, among debts equal in their nature, give a preference to which he pleases; nay, by confessing judgment to a creditor by simple contract, he may give him a preference to creditors of a superior nature. Every man by paying a debt, when he owes others, gives that creditor a preference. If paying of the children, if they had been of age to receive it, had been lawful for the mother, as most certainly it had, the giving security for the doing of it must be lawful too. She was so far from being a bankrupt at the execution of this deed, that it is plain she did not think of becoming one at the time; for if she had, she never would have sent her forty thousand pounds to have supported her brother's credit. The case of *Taylor v. Wheeler*, reported by *Salkeld* (*a*), is a strong case; for there the mortgagee had no more estate in law in the land than the children have here in the stocks untransferred. Articles of agreement for a jointure have been held good against assignees, though legal estate in them.

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PARKER, *Lord Chancellor*, after giving a narrative of the state of the case, observed, that the clause of the will that directs the

(*a*) Salk. 449.

children's

children's fortunes to be placed out by *Mrs. Cock*, with the conſent of the major part of the guardians, to intereſt, or other way of improvement, muſt be underſtood excluſive of trade; ſo that it was plainly never the intention of the father, that the fortunes of the children ſhould be hazarded in the way of trade. He obſerved further, that whoever traded with her knew that ſhe had but one-third of her huſband's eſtate; and therefore gave her credit upon account of * that third only. And for her to have hazarded the fortunes of her children in trade had been a plain breach of truſt in her. He took notice, that upon the death of the father there was a great part of his eſtate in the public funds; and that in the year 1720 ſhe had a great deal of money in the funds, which as to a great part of it might be the very original ſtock of her huſband, or at leaſt ſtock replaced in the room of it. It is plain, that as her ruin was owing to the bankruptcy of her brother, ſhe hoped this might have been prevented by the ſpeedy ſupply of forty thouſand pounds, which ſhe ſent him at this time. If ſhe had not thought this, it was directly flinging away ſo much money. So that this deed cannot be ſaid to have been made upon a certain view of her becoming a bankrupt. Fears, indeed, ſhe could not but have; ſhe might think, that though her brother did aſſure her that this ſupply would ſupport his credit, yet poſſibly it might not. And therefore at a time when ſhe was ſtriking this bold ſtroke to ſave her brother, it was but juſt and prudent for her to reſolve in all events to ſecure what was due from her to her children. The objection againſt this deed, that it is a fraudulent one, and within the ſtatute of 1. *Jac.* 1. c. 15. becauſe made ſo near the act of bankruptcy, is a very frivolous one; for the deeds meant by that ſtatute are deeds made to defraud creditors, whereas this is a deed made to ſecure a juſt debt. But it is objected, that this deed is made to give an undue preference to her children. I know not what law or reaſon there is to favour this objection. Anybody may make his creditor executor, and then the law gives him a preference; and not only ſo, but the law allows this executor to give any other creditor, in equal degree, a preference. It is true indeed, ſometimes this Court will interpoſe, becauſe theſe powers may be an inlet to fraud; but this Court * will never take from the executor himſelf this preference the law gives him. Is not paying of a debt giving that creditor as great a preference as giving ſecurity? And yet it was never pretended, that paying of a debt ſhould be held an act of bankruptcy, becauſe but two months before the bankruptcy. But it is ſaid, that this is done for children; and they are the fitteſt perſons to ſuffer in their parents misfortunes. Caſe of children is always favoured in a court of equity; they are eſteemed as creditors of the parents by nature. If a man by his will give copyhold lands to his younger children, the Court will compel the heir at law to ſurrender to them. Very ſtrange doctrine, that the plaintiffs, becauſe creditors by nature as well as juſtice, ſhould be in a worſe condition than other creditors. Very ſtrange, that it ſhould be eſteemed a fraud in a

Cock *againſt* Goodyellow.

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Stat. 1. *Jac.* 1. cap. 15.

2. Fonblanque's Equity, 414.

* [497]

Cock against Goodfellow.

parent to follow the voice of nature; eſpecially when in doing this, ſhe does but what duty and juſtice require from her, as their guardian and truſtee. If the mother had been going to ſea, and had made this proviſion for her children's ſecurity, the very ſame objections might have been made. A man who knows he muſt be a bankrupt may by law pay off any of his creditors. And this power, as it may be abuſed, ſo, on the other hand, may be very properly executed; there may be particular obligations in point of gratitude, &c. Aſſignees can take nothing but what the commiſſioners can aſſign; and the commiſſioners can aſſign nothing but what the bankrupt could honeſtly aſſign to them. If *Mrs. Cock* had transferred (ſubſequent to the deed) this ſtock, for a valuable conſideration, to perſons without notice, it had been a valid but knaviſh act. The caſes of an * agreement to transfer ſtock, the transfer wanting, or agreement to ſurrender copyhold, the ſurrender wanting, are both alike; and therefore, as the Court will compel a ſurrender, ſo it will a transfer. He ſaid, that a purchaſer's being decreed to hold the land againſt a judgment, confeſſed between the time of articles and the conveyance, was a very ſtrong caſe for the plaintiffs. He called the deed an honourable deed; and eſtabliſhed it throughout.

* [498]

TRINITY

TRINITY TERM;

The Eighth of George the Firſt,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

Le Croy *againſt* Eaſtman.

Caſe 228.

LE CROY bought nine hundred and ninety pounds *South-Sea* ſtock of *Le Grand*; but not caring to have this ſtock in his own name, it was at his deſire transferred to the defendant; from whom the plaintiff took a note, declaring that he was a truſtee of this ſtock for the plaintiff; and that he would be accountable to him for the ſtock and produce. Afterwards when the ſtock was ſold for about ſix hundred *per* * *cent.* the plaintiff deſired that the defendant would transfer the nine hundred and ninety pounds ſtock to him: The defendant accordingly transferred five hundred pounds of this ſtock, and told the plaintiff that it would be inconvenient to him at that time to transfer more, but that it was all one, for he would be accountable for the ſtock; and adviſed the plaintiff as a friend, not to part with that five hundred pounds ſtock, which he had transferred to him, for he was very ſure ſtock would riſe very conſiderably; which advice the plaintiff admits he ſo far followed, as that the five hundred pounds was ſtill unſold, believing the defendant to have a greater inſight into theſe matters than himſelf. Upon the fall of the ſtock, the plaintiff brings his bill againſt the defendant, praying that he might account for the four hundred and ninety pounds ſtock at the price the ſtock then went, *viz.* ſix hundred pounds, inſiſting that when the defendant told the plaintiff, that he would be accountable for the ſtock, he underſtood him to mean at the price the ſtock then went.

The queſtion was, whether a truſtee of *South-Sea* ſtock ſhould anſwer the value of the ſtock when ſold by him; or only be accountable for ſtock and dividends? Reſolved in favour of the truſtee, upon the circumſtances of the caſe.

S. C. 2. Eq. Abr. 6.

It appeared by the defendant's anſwer, that the defendant had, ſome time after he was a truſtee, mortgaged a thouſand pounds ſtock to the *South-Sea* Company for four thouſand pounds, and

LE CROY *againſt* EASTMAN.

that afterwards the defendant ſold out all the ſtock he had in his own name, except eighty pounds, but that he had more than ſtock enough in another perſon's name to have anſwered the truſt, if the plaintiff had inſiſted upon a transfer. And he now offered to transfer to the plaintiff the four hundred and ninety pounds ſtock and produce.

PARKER, *Lord Chancellor*. It is not material to prove at what rate the defendant ſold the ſtock, for the ſale was at his own riſk. If the ſtock had roſe, he would ſtill have been accountable for the ſtock, not the money; and therefore as he muſt have ſtood to the loſs in caſe of the riſe of ſtock, it is reaſonable he ſhould reap the advantage upon a fall. Indeed, if the plaintiff has ſuſtained any loſs, by the truſtees meddling with the truſt ſtock, he ought to
* [500] have a ſatisfaction for it: but nothing of this appears; * on the contrary he, believing the ſtock would ſtill riſe, has the five hundred pounds ſtock actually transferred by him unſold to this day; as probably for the ſame reaſon, he would have had the four hundred and ninety pound ſtock ſtill by him, in caſe that likewiſe had been transferred to him. It is extremely hard to conceive, that when the defendant told him he would be accountable for the ſtock, he ſhould underſtand him of the money ariſing from the ſale of the ſtock; when it is plain, he took the defendant's advice of not ſelling, and believed the ſtock would riſe; and therefore would naturally deſire, as in reaſon he might, that the defendant would be accountable for the ſtock. I take it to be very plain, that the defendant has not ſold, but mortgaged the truſt ſtock. For ſince there is no ſpecificating one hundred pound *South-Sea* ſtock from another, a court of equity will never adjudge a man to have broken his truſt in a higher degree, when he may with equal reaſon be adjudged to have done it in a lower; and therefore the ſtock mortgaged muſt be eſteemed the ſtock of the plaintiff, the ſtock ſold that of the defendant. The defendant muſt only account for the ſtock and produce. Let both ſides bear their own coſts. In caſe the defendant had failed, and the ſtock been worth redeeming, he thought the plaintiff would have had a clear title to redeem; but then THE COMPANY muſt have had notice of the truſt.

* [501]

Caſe 229.

* Gore *againſt* Gore.

A deviſe to truſtees and their heirs for a term of five hundred years, for the payment of an annuity to his eldeſt ſon for life, with remainder

WILLIAM GORE had iſſue *Thomas* and *Edward*, and being ſeiſed in fee of certain lands, he deviſed his lands to two truſtees and their heirs for the term of five hundred years, for the payment of fifty pounds a-year to the eldeſt ſon during his life, the remainder from and after the determination of the ſaid term, to the uſe and behoof of the firſt ſon of the body of the ſaid *Thomas* his eldeſt ſon to be begotten, and the heirs males of the body of the firſt ſon;

from and after the determination of the term, to the uſe of the firſt ſon of the body of ſuch eldeſt ſon to be begotten, &c and for default of ſuch iſſue, remainder over in fee; the remainder is good by way of *executory deviſe*.—S. C. 9. Mod. 5. S. C. 2. Peer Wms. 28. S. C. & Eq. Abr. 339. S. C. 2. Bar. 209. 229. 355. S. C. 2. Stra. 958.

remainder

remainder to the ſecond, third, and ſo on to the tenth ſon over in tail; and for default of ſuch iſſue, remainder to *Edward* his ſecond ſon.

Gore against Gore.

N. B. When the teſtator died, his eldeſt ſon *Thomas* had no iſſue; but ſince his death had iſſue a daughter, and very likely to have more children.

PARKER, *Lord Chancellor*, made a caſe of it, and ſent it to the Judges of the king's bench for their opinion. The Judges certified their opinion to be, "that the deviſe to the firſt ſon of "*Thomas Gore* was void; for it could not take effect as a remain- "der, becauſe there was no freehold to ſupport it; nor by way of "executory deviſe, becauſe it was not to take place within that "compaſs of time the law allows for that purpoſe. They de- "clared likewiſe their opinion to be, that the remainder to the "ſecond ſon was veſted in him on the death of the teſtator."

When the cauſe, upon the certificate of the Judges, came back into chancery for the direction of the Court,

SIR ROBERT RAYMOND, *Attorney-General*, was going to argue againſt the opinion of the Judges; but was * ſtopped by

* [502]

THE LORD CHANCELLOR, who told him, that he thought he muſt be concluded by the opinion of the Judges. He admitted, that in caſe he had ſent for the Judges to have aſſiſted him in the hearing of the cauſe, and the reaſon of the Judges had not convinced him, he muſt have acted according to his own underſtanding, for it was to be his decree, not theirs (and this LORD NOTTINGHAM did in the caſe of the *Duke of Norfolk*), but that here he was not at that liberty; having not heard the arguments at law before the Judges, nor been acquainted with the grounds on which their opinion was founded; and that he looked upon the Judges here in the nature of referrees.

THE LORD CHANCELLOR, upon further debate of the caſe, ſaid it was as undoubtedly the intention of the teſtator, that the iſſue of the eldeſt ſon ſhould not be diſinherited, as it was that the eldeſt ſon ſhould: That the intention of the teſtator, if it could poſſibly, by rules of law, ought to be ſupported, being a very reaſonable one; and that Judges have been commended for being *aſtuti* in doing this.

Upon this it was ſaid, if the ſon of the eldeſt ſon ſhould take when born, it muſt be by way of executory deviſe; and then the conſequence muſt be, that the eldeſt ſon would take until a ſon was born; whereas the teſtator plainly intended him nothing.

LORD CHANCELLOR. I do not know, whether this be a neceſſary conſequence. And whether I cannot take a middle way, and as there is a precedent term, decree that after debts paid, the truſtees ſhall be accountable to the after-born ſon for the profits.

GORE *againſt* GORE.

Let it ſtand over.

Afterwards the parties agreed before anything more was done in it (*a*).

(*a*) But afterwards the ſon of *Thomas Gore* brought this matter again into Chancery, and KING, *Lord Chancellor*, ſent it a ſecond time to the king's bench, where HARDWICKE, *Chief Juſtice*, PAGE, PROBYN, and LEE, *Juſtices*, were of opinion againſt the opinion of their predeceſſors, that this was a good executory deviſe, and not too remote; for that it muſt in all events, one way or other, happen upon the death of *Thomas Gore*, whether he ſhould have a ſon or not, and either upon the birth of the ſon, or upon his death without iſſue male, the freehold muſt veſt; and accordingly they certified, "that the deviſe of the manors of "*Barrow* and *Southley* to the firſt ſon of "*Thomas Gore*, is good by way of executory deviſe, and that the freehold of the "ſaid manors, at the death of the deviſor, veſted in his heir at law."—S. C. 2. Peer Wms. 64. S. C. 2. Strk. 958.

* [503]

Caſe 230.

* Lewis *againſt* Lord Lechmere.

Bill for ſpecific performance of articles for the purchaſe of an eſtate, diſmiſſed with coſts; becauſe the title was not laid before the vendee's Counſel within the time limited.

2. C. 2. Eq. Abr. 20. 689.

THIS was a bill brought by the plaintiff for a ſpecific performance of articles, bearing date the thirtieth day of *Auguſt* 1720, whereby *Lord Lechmere* had covenanted to purchaſe ſuch an eſtate at forty years purchaſe; provided the plaintiff did, on or before the tenth day of *November* following, lay ſuch an abſtract of the title before *Lord Lechmere's* Counſel, as they ſhould approve.

The bill was diſmiſſed with coſts; becauſe the plaintiff had not laid his title before *Lord Lechmere's* Counſel within the time limited by the articles; which time, THE LORD CHANCELLOR was pleaſed to ſay, was very material; the price of *South-Sea* ſtock, from whence the money for the purchaſe was to be raiſed, being upon the tenth of *November* two hundred and ſixty *per cent.* and at the time of the hearing the cauſe, but ninety-two *per cent.*

Though this was that, upon which THE CHANCELLOR was pleaſed to found his decree; yet there were ſeveral other things in the cauſe.

Whether it be conſiſtent with the rules of equity to decree a performance in ſpecie of ſo extravagant and unreaſonable a bargain as a ſale of land at forty years purchaſe? This point not determinedhere, but ſee 2. Vern. 423.

IT WAS INSISTED *for the defendant*, that the greatneſs of the price, double the value of the land, was reaſon enough for a court of equity not to interpoſe, ſo as to inforce a ſpecific performance; that being intirely a diſcretionary power, and what the Court *ex debito juſtitiæ* is not bound to do. It was acknowledged, that no decree had been made purely upon this point; but it was ſaid, there were ſeveral caſes where this circumſtance had great weight with the Court. In the caſe of *Hanger v. Eyles* (*a*) of the laſt Term, where the vendor brought his bill for the money, though the decree was founded upon the vendor's not being * able to convey a manor, according to his covenant; yet it being acknowledged, that this manor was of little or no value, it is evident, that

* [504]

(*a*) 2. Eq. Abr. 20. 689.

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the other circumſtance in the cauſe, the unreaſonableneſs of the price, was that which really inclined the Court to lay hold upon a point, too inconſiderable otherwiſe to have been taken notice of. In the caſe likewiſe of *Hicks v. Philips (a)* of the laſt Term, which was a bill brought by the vendor for a ſpecific performance of articles, the bill was diſmiſſed; becauſe the vendor had covenanted to convey freehold, and one acre or two proved copyhold; even though the vendor offered to procure an enfranchiſement of this land, or make any compenſation in the price; which ſhews the regard had by the Court to this other circumſtance attending the caſe, *viz.* the unreaſonableneſs of the price.

As to this point *it was anſwered by* THE COUNSEL *for the plaintiff*, that if a court of equity were to ſet aſide agreements upon this account, it would make all tranſactions precarious and uncertain, and inveſt a court of equity with a very arbitrary power; the value of money and land being always various and uncertain. That if any meaſure was to be laid down in this caſe, the point to be conſidered muſt be, whether the contract was an unreaſonable one at the time it was made. And accordingly upon this ground, it was lately determined in the court of exchequer, in this caſe of *Keen v. Stuckley (b)*, that they would inforce a ſpecific performance of theſe contracts, if the price was reaſonable at the time the contract was made, how diſproportionable ſoever after accidents might make it.

IT WAS INSISTED *by the Counſel for the plaintiff*, that the clauſe making void the articles, in caſe the plaintiff did not, by ſuch a time, lay ſuch an abſtract of * the title before the Counſel of the defendant as they ſhould approve, had been obtained by fraud and ſurprize, and was an unreaſonable clauſe. As to the fraud and ſurprize, they failed in their proof; but inſiſted upon the unreaſonableneſs of it; becauſe though the title was never ſo clear and good, yet if the Counſel of the defendant ſhould diſapprove of it, or give no opinion of it at all, the articles muſt be void. * [505]

BUT TO THIS *it was anſwered*, that the meaning of this clauſe was no more than that the plaintiff ſhould make out a good title; for if the Counſel ſhould be ſuppoſed to act unreaſonably, and to diſapprove of a good and clear title (ſuch a title as a court of law or equity would take to be a good title) yet the defendant would be bound, notwithſtanding the diſapprobation of his Counſel.

IT WAS SAID *by the Counſel for the defendant*, that though in caſe of articles entered into for the purchaſe of lands, the vendee Not the ſame reaſon for admitting the vendor to come into equity for a ſpecific performance, as there is for the vendee; ſince the one comes there to obtain that for which he has no remedy at law, *viz.* the land; but the other wants nothing but the money, which he may recover at law in damages. But this was determined in favour of the vendor; becauſe upon mutual covenants there ought to be mutual remedies.

(*a*) Prec. Ch. 575. 2. Eq. Abr. 18. 688.

(*b*) But this decree of the court of exchequer was reverſed in the houſe of lords, Gilb. E. R. 155.—NOTE *to former edition.*

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Lewis *againſt* Lord Lechmere.

may undoubtedly exhibit his bill in equity for the ſpecific performance of theſe articles; yet it might admit of a doubt, whether the vendor might do the ſame. As to the vendee, though he has an action at law upon the articles, yet that founds only in damages; and therefore he may come into equity for the land, which on ſeveral accounts may poſſibly be more deſirable to him than any pecuniary compenſation. But for the vendor, he only deſires to have the money; and that, whether it be recovered at law in damages, or in equity, is but money ſtill. * If it be ſaid, that at law the jury may at their own liberty and diſcretion, give him what damages they upon all the circumſtances of the caſe think reaſonable; whereas upon a bill in equity, your lordſhip has no power to vary from the ſum contracted for in the articles, be the circumſtances of the caſe what they will; this ſeems to be a very odd reaſon for coming into a court of equity, and the reverſe of what generally intitles people to relief in equity.

* [506]

BUT TO THIS *it was anſwered*, that upon mutual articles there ought to be mutual remedies: that if the vendee had a remedy both in law and equity, the vendor would not be upon a par with him, unleſs he had ſo too: that the remedy the vendor had at law, was not a remedy adequate to what he had in this court; for at law they only could give him the difference in damages, whereas he might for particular reaſons ſtand in need of the whole ſum. Beſides, by the articles the land is bound, and the vendor is in nature of a truſtee for the vendee; and whether a recovery in an action of law upon the articles, may make him ceaſe to be ſo, is not entirely clear.

THE LORD CHANCELLOR was of opinion, that the remedy the vendor had at law upon the articles was not adequate to that of a bill in equity for a ſpecific performance.

However he diſmiſſed the bill, upon the point above mentioned at the beginning of the caſe.

MICHAELMAS TERM,

The Ninth of George the First,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

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* [507]

* Hobſon and his Wife *againſt* Trevor.

Caſe 231.

THIS was a bill brought for the ſpecific performance of an agreement, made upon the marriage of the defendant's daughter with the plaintiff. Bill for ſpecific performance.

The caſe was this:

Trevor gave encouragement to the plaintiff, a young gentleman under age, ſon of *Sir Charles-Hobſon*, eſteemed a man of very good ſubſtance, to make addreſs to his daughter; and promiſed him, in caſe he would marry her, that he would ſettle upon him and his daughter, the third of whatever eſtate ſhould come to him, upon the death of his father the *Maſter of the Rolls*; and did accordingly enter into a bond to him, before the marriage, in the penalty of five thouſand pounds, whereof the condition was to this effect: "WHEREAS it is agreed between the defendant and the plaintiff, "that in caſe a marriage intended to be had between the defen- "dant's daughter and the plaintiff take effect, the defendant ſhould "within three months after the death of his father, ſettle one third "of whatever eſtate ſhould come to him * upon his daughter "and the plaintiff for the term of their lives, and the longeſt liver "of them; remainder to the iſſue of the body of his daughter, &c. "and for default, &c. to the right heirs of the defendant *Trevor*: "NOW THE CONDITION of this obligation is ſuch, that in caſe "ſuch ſettlement ſhall be made, &c."

T. in conſideration of *H.*'s marrying his daughter, enters into a bond to *H.* to ſettle, &c. one third of whatever eſtate ſhould come to him upon the death of his father. Decreed that the condition of this bond

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ſhould be ſpecifically performed; for the deſign of the agreement of which this bond was an evidence, being to make laſting proviſion

Upon the death of the maſter of the rolls, *Sir John Trevor*, ſo conſiderable an eſtate fell to the defendant, as that the third amounted

for wife and children, could never be ſatisfied by the forfeiture of the penalty, which would be all the huſband's.—S. C. 1. Stra. 533. S. C. 2. Eq. Abr. 21. S. C. 2. Peer Wms. 191.

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HOBSON AND HIS WIFE *against* TREVOR.

to about ſixteen hundred pounds a-year. And therefore the plaintiffs prayed a ſpecific performance of the articles, inſiſting that the forfeiture of the penalty would not anſwer the end of this agreement; for that being money, would go as money to the executors of the huſband, and be entirely under the huſband's power; whereas the intention of this agreement, by the nature and manner of it, was to make a laſting proviſion for wife and children. And it was inſiſted that this bond was a plain and ſufficient evidence of this agreement.

IT WAS INSISTED *for the defendant*, that this agreement was not abſolutely to ſettle, &c. but to ſettle, or in caſe he did not, to forfeit the penalty of five thouſand pounds. The penalty of the bond, in the very nature of it, ſeems to be a ſum fixed upon by the parties themſelves, upon the payment of which the party bound ſhall be looſed from his obligation. And if this is to be intended in any caſe, it ſeems reaſonable to intend it here, where not a ſhilling is ſettled, or agreed to be ſettled by the huſband; ſo that this whole proviſion is on the defendant's ſide a perfect bounty. It was ſaid, that the father of the young gentleman, though once a rich man, had the misfortune to loſe moſt of what he had in the hands of a banker that failed. It was urged, that agreements to make ſettlements in the life-time of parents, and before any eſtate deſcended, were of ill conſequence, and by no means to be favoured or ſupported in a court of equity. * As to the objection, that the forfeiture of the penalty would not anſwer the deſign of the parties, which was to make a laſting proviſion for wife and children; it was anſwered, that ſince the penalty of five thouſand pounds came in lieu of the ſettlement, it would be in the power of this Court, upon a proper application, to have the five thouſand pounds ſettled in the ſame manner, for the benefit of the wife and children.

*[509]

BUT IT WAS STRONGLY INSISTED *in behalf of the plaintiff*, that the agreement of the parties was to make the ſettlement; and not to make the ſettlement, or forfeit five thouſand pounds. That this plainly appeared, by the recital of the bond, to be the agreement. That the end and deſign of the agreement was the making a proviſion for wife and children, which would not be attained by the forfeiture of the penalty; for that would be a debt due only to the huſband, and ſubject entirely to his diſpoſal. Very ſtrange to imagine, that the defendant ſhould inſiſt upon a proviſion for his daughter and her iſſue, in caſe leſs than fifteen thouſand pounds deſcended to him from his father; but in caſe more than that, he ſhould take no care at all of her, but leave her entirely to the mercy of her huſband. For this is the plain conſequence of ſuppoſing the agreement to be, either to make the ſettlement, or forfeit the penalty; ſince in caſe the defendant chooſes to forfeit the penalty, then the only proviſion for the wife and children is this penalty; which being a debt due to the huſband, the court of chancery

chancery cannot oblige him to ſettle it, in the ſame manner as the land. If the circumſtances of things as they ſtood at the time of making this agreement, and the nature of this agreement be conſidered, it will appear not only to have been a reaſonable agreement, but an advantageous one on the ſide of the defendant. * The plaintiff was the ſon of *Sir Charles Hobſon*, a very rich man; and though he had very conſiderable loſſes afterwards, yet it does not appear in the cauſe, but that this might be after the time of the agreement; ſo that there was a fair expectation; and his ſon was put out to a wholeſale linen-draper, a very good trade, and requiring a very good ſtock to ſet up with. As to the ſettlement from the plaintiff, there was none to be expected, he being under age; but in conſequence of his trade, he was to be a freeman of *London*, and that would be a proviſion. As to the defendant; it is well known, that though he was eldeſt ſon to the late maſter of the rolls, yet he was under his father's diſpleaſure, and ſo not likely to have anything at all, or at leaſt but a trifle, from his father. And this is another plain evidence, that this agreement was to ſettle, not ſettle or forfeit; for his expectations being ſo ſmall, the penalty of five thouſand pounds muſt have been eſteemed by the parties as a ſufficient ſecurity to inforce the performance of this agreement; and it is impoſſible to ſuppoſe, that the defendant could be then providing in his thoughts for that election now inſiſted upon. As to the nature of the agreement, it is highly reaſonable. A father upon the marriage of a daughter, his only child (and very like to continue ſo) agrees to ſettle a third of his eſtate upon a double contingency: FIRST, The death of his father before him; for if his father had outlived him, the whole agreement was void. AND SECONDLY, In caſe any eſtate came to him from his father; for in caſe none came, as there was too much reaſon to fear, then the agreement was likewiſe void. Upon this double contingency a father agrees, upon the marriage of his daughter and only child, to ſettle one third of what he ſhould have upon the death of his father, upon her and her huſband for term of their lives, and the longeſt liver of them, then to the iſſue * of that marriage in tail, reverſion to his own right heirs. Here is nothing agreed to be ſettled but upon his own child; the very reverſion is to his own right heirs. The huſband has only an eſtate for life; and in caſe of iſſue, the law itſelf had done as much for him, in making him tenant by courteſy. This is an agreement made by one of full age, and not a child; a father upon the marriage of his daughter; and therefore not like the caſes of young heirs, unwarily drawn in, in the life-time of their parents, to part with reverſions. The defendant himſelf encouraged the match; looked upon it to be ſo advantageous, as that he thought it reaſonable to have ſettled half inſtead of a third; and bragged how well he had provided for his daughter, in caſe his father ſhould die and leave him nothing.

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PARKER, *Lord Chancellor*, decreed the land to be ſettled purſuant to the condition of the bond; and declared, that if the agreement

HOBSON AND HIS WIFE *against* TREVOR.

ment had been to have made the settlement, or forfeited the penalty, it would have been a debt due to the husband, and not in the power of the Court to have taken care of the wife and children, by ordering the five thousand pounds to be settled.

Quære of this, it coming in lieu of the settlement.

HILARY

HILARY TERM,

The Ninth of George the Firſt,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

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* Cartwright *againſt* Cartwright,

* [512]

Caſe 232.

Roman Catholicks.

J. S. deviſed to truſtees and their heirs, for the life of *Sir Charles Cartwright*, and two years longer; and then taking notice, that the children of *Sir Charles Cartwright* were all beyond the ſeas educated *Roman* Catholicks, directs, that in caſe any of the ſons of *Sir Charles Cartwright* ſhould within thoſe years become a proteſtant, and receive the ſacrament according to the uſage of the church of *England*, then the truſtees were to hold the eſtate in truſt for ſuch ſon in tail; remainder over, &c. And in caſe no one of the ſons ſhould conform; then in caſe any one of the daughters ſhould within thoſe two years become a proteſtant, and take, &c. in truſt for that daughter in tail; remainder over, &c. And then he charges his eſtate with ſome annuities, payable to the ſons and daughters of *Sir Charles*. *Sir Charles* died; no one of his ſons did within the two years become a proteſtant, or receive the ſacrament, &c. but one of the daughters did within the two years receive the ſacrament twice according to the uſage of the church of *England*, and the truſtees * actually permitted her to receive the rents and profits of the land.

* [513]

This daughter brings a bill in equity, againſt the truſtees, and all the children, and one in remainder being an infant (who had a right to the eſtate in caſe the daughter was not well intitled to it) to compel the truſtees to convey to her, in order to enable her to dock the entail, by ſuffering a common recovery, and ſo make a good title to a purchaſer.

The truſtees by their anſwer own, that they had permitted the plaintiff to receive the rents and profits, conceiving ſhe was well intitled thereunto, by having received the ſacrament, &c. the teſt pitched

CARTWRIGHT against CARTWRIGHT.

pitched upon by the teſtator, of the ſincerity of her converſion; pray that a receiver may be appointed; and that they may be diſcharged of the truſt.

The children all by their anſwers conſent to the ſale of the eſtate, and that the truſtees may convey; the daughter having given a bond to pay the ſum of fifteen hundred pounds in ſatisfaction of the annuities given to them, and charged upon the eſtate.

PARKER, *Lord Chancellor.* I am not ſatisfied of the reality of the converſion of the daughter. As to the proof offered for it; it is no more than the bare act of having received the ſacrament twice; an act very common for *Roman* Catholicks to do upon a worldly motive, and then we hear no more of them. It is remarkable, that the witneſs who ſwears to her converſion does not ſay that he believes her now to be a proteſtant; but that four years ago ſhe was one. The readineſs of the children in their anſwers to do what is deſired of them, looks very ſuſpicious. As to the bond given for the payment of fifteen hundred pounds, I much ſuſpect a defeaſance in caſe this bill miſcarry; and indeed I do not
* [514] * ſee any conſideration for the giving it; for the annuities charged upon the land, are certainly profits ariſing out of land; and the children being all *Roman* Catholicks, the deviſe is void as to that. Indeed, if the daughter had had a clear title, and her converſion been out of doubt, there was no occaſion for coming here; for if the daughter had ſuffered a common recovery, or levied a fine of the truſt in tail, it had been binding in equity.

Let a receiver be appointed; I will conſider further of the decree.

It was preſſed by the Counſel, that in the mean time they might have liberty to give further evidence of the ſincerity of her converſion; and they quoted the caſe of *Rawlinſon v. Rawlinſon (a)*, before LORD COWPER, where that liberty was indulged.

THE LORD CHANCELLOR. I will do nothing now.

(a) Prec. Chan. 537.

MICHAELMAS TERM,

The Tenth of George the Firſt,

IN

The Court of Chancery.

Thomas *Lord* Parker, *Lord Chancellor.*
Sir Joſeph Jekyll, *Knt. Maſter of the Rolls.*

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* Parks *againſt* Wilſon. *[515] Caſe 233.

A AND *B.* brother and ſiſter; *B.* the ſiſter has iſſue two daughters, and one ſon called *Anthony*. *A.* the brother being ſeiſed of an eſtate of copyhold, and intending that not his ſiſter, who was his heir at law, but *Anthony* her ſon, ſhould have the land, reſolved to ſurrender it to the uſe of his will, and deviſe it to *Anthony*; but the officers of the court being out of the way, and a ſurrender not practicable, the mother conſented to enter into a bond to her ſon, that ſhe would at any time, upon the payment of two hundred pounds, and upon the requeſt of *Anthony* her ſon, ſurrender the eſtate to him. This bond was executed in *November* 1713, about which time *A.* died. After his death, *Anthony* the ſon received and enjoyed the rents and profits of the eſtate during the life of the mother; but no ſurrender was ever made by the mother to *Anthony* in purſuance of the condition of the bond; nor was there any requeſt for her ſo to do. **Anthony* dies without iſſue and inteſtate, and his mother took out letters of adminiſtration; and likewiſe after his death, ſhe got herſelf admitted, and entered upon the land, and received the rents and profits; and then deviſes the land to one of her daughters and dies. The other daughter, and ſiſter of *Anthony*, brings her bill againſt her ſiſter the deviſee of her mother, praying to have a decree for a ſurrender, and proper conveyance of a moiety of the land, which ſhe would have been entitled to, had her mother ſurrendered to *Anthony* her brother, as ſhe ought to have done, in purſuance of the condition of the bond for that purpoſe entered into.

S. C. 9. Mod. 62. S. C. 2. Eq. Abr. 22. 2. Peer Wms. 191. 1. Vezey, 391. 409. 1. Stra. 533. Fonbl. Eq. 142. 1. Powell on Contracts, 314. 2. Fonblanque's Equity, 37.

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IT WAS ARGUED *in favour of the plaintiff*, that from the nature of the caſe, it appeared plainly to be an agreement between *A.* and

PARKS *againſt* WILSON.

his ſiſter, that her ſon ſhould have the land; and that in a court of equity, this bond would be interpreted as an undoubted evidence of this agreement; and that there were ſeveral inſtances, where bonds had been conſidered in this light by the Court. It was ſaid, that in the caſe of *Thynn* of *Egham (a)*, a perſon, being made executor upon an antecedent promiſe, that he would not thereby take any advantage with reſpect to any part of the perſonal eſtate, but let ſuch a one have it; it was held that this promiſe made him a truſtee in this court.—It was further inſiſted upon, that the mother's permiſſion of the ſon to receive and enjoy the profits of the land, was a carrying this agreement into execution, which made it a much ſtronger caſe. And then if *Anthony* himſelf had a right at any time during his life to have come into this court, and inſiſted upon the ſpecific performance of this bond, certainly death, the act of God, ſhall not in this court put his heir in a worſe condition.

*[517] * IT WAS INSISTED *for the defendant*, that by the evidence it did indeed appear, that it was once the deſign of the uncle to have given his nephew this land; but that afterwards he changed his mind, and gave him this bond in the room of it. It was ſaid, that this bond, being gone in law, upon account that *Anthony* being dead inteſtate, the mother the obligor had taken out letters of adminiſtration; and alſo by reaſon that there was no requeſt made by *Anthony*, during his life, for the ſurrender; ought not to be ſet up in equity. It was ſaid, that poſſibly, *Anthony* having by his mother's conſent enjoyed the profits of the land, without having ever paid the two hundred pounds, might for that reaſon make no will; as conceiving that the bond being thereby extinguiſhed, there would remain no obligation upon the mother to ſurrender.

PARKER, *Lord Chancellor*. It is plain from the nature of this tranſaction, that it was the fixed intention of the uncle, that, one way or other, his nephew ſhould have the land. In order thereunto he attempted more than once to ſurrender to the uſe of his will, reſolving to deviſe it to his nephew; but a ſurrender not being practicable, by reaſon of the accidents ſet forth in the evidence, he then had recourſe to this bond, as the next beſt method to ſecure it to him. So that this bond is not to be conſidered as ſomething given in lieu of the land, which the uncle once intended him, but as another medium of ſecuring the land to him; and on the part of the mother it amounts plainly to an agreement that the ſon ſhould have the land. The conſequence of which will very plainly be, that the mother muſt be conſidered by this Court as a truſtee for her ſon; and then I ſhall have no regard at all to the

*[518] niceties of law, of the bond's being extinguiſhed and * gone either by the obligor's being adminiſtratrix to the obligee, or for want of a requeſt (*b*). The authorities are many in this court, that bonds

(*a*) 1. Vern. 296.

(*b*) See Gage *v.* Acton, Com. 67. Acton *v.* Peirce, 2. Vern. 480. Dale *v.* Smithwick, 2. Vern. 151. Cannel *v.* Buckle, 2. Peer Wms. 243. Watkins *v.* Watkins, 2. Atk. 97. Beard *v.* Beard, 3. Atk. 72.

have

have been conſidered as evidences of agreements, and obligors held to a ſpecific performance (*a*), and not allowed to forfeit the penalty.—There muſt be therefore a ſurrender and conveyance: But then the plaintiff muſt pay the two hundred pounds with intereſt from the death of the uncle; *Anthony* having during his life, by the conſent of the mother, received and enjoyed the profits of the land.

PARRE *againſt* WILSON.

(*a*) Ld. Ray. 683. 1. Vern. 24. 340. 393. 1. Peer Wms. 608. 3. Peer Wms. 288. 3. Atk. 547.

Atcherley *againſt* Vernon.

Caſe 234.

MR. VERNON made his will the ſeventeenth of *January* 1711, and by this will he veſted the bulk of his eſtate, real as well as perſonal, in five truſtees, for the uſe of *Bowater Vernon*, &c. and alſo he gave the reſidue of his perſonal eſtate to the ſame truſtees, to be inveſted in land, and ſettled to the ſame uſes.

S. C. 9. Mod. 68. S. C. 2. Eq. Abr. 209. S. C. 1. Peer Wms. 783. S. C. Comy. 581. S. C. 3. Bro. P. C. 167.

He gave his wife five hundred pounds, to be paid her preſently by the truſtees; and a thouſand pounds a-year free from all taxes but parliamentary ones, in full ſatisfaction of dower, jointures, and all demands out of his real eſtate, to be paid by the truſtees. He gave her alſo all his plate, and his *London* houſe, and the goods and furniture; he gave her likewiſe the uſe of his houſe at *Hanbury*, with all the demeſne lands and park that he kept in his own hands, with all the goods and furniture, together with the books, for her life.

He gave his ſiſter and heir at law, *Mrs. Atcherley*, two hundred pounds a-year for her ſeparate uſe; and his niece *Letitia Atcherley* one thouſand pounds.

After the making of his will, he purchaſed ſeveral eſtates in land; ſome of which purchaſes were completed, and the conveyances executed in his life-time; * but in ſome they were only contracted for, part of the purchaſe-money paid, but no conveyance executed; and in ſome the time limited by the articles for executing the conveyance was not come.

* [519]

He purchaſed likewiſe a copyhold eſtate; but that purchaſe was completed, ſave that he was pleaſed, that the vendor's name ſhould be made uſe of in truſt for him.

Mr. Vernon being ſeiſed of the manor of *Hanbury* in fee; out of which there was payable to the crown a fee-farm rent of thirty-five pounds a-year, purchaſed this in, and took a conveyance of this fee-farm rent to himſelf in fee.

Matters ſtanding thus, *Mr. Vernon*, on the ſecond of *February* 1720, added a codicil to his will; in which codicil he firſt takes notice, that he had made his will, bearing date on or about the ſeventeenth day of *January* 1711, and ratifies and confirms this

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his will in every part thereof; ſave what alteration he ſhould make by that codicil.

He further takes notice, that he had by his will given his ſiſter and heir at law two hundred pounds a-year to her ſeparate uſe, during her life, and a thouſand pounds to his niece *Letitia Atcherley*; and by his codicil makes the two hundred pounds four hundred pounds, in caſe ſhe ſurvived her huſband: and increaſes the ſum of one thouſand pounds to ſix thouſand pounds, to be paid his niece upon day of marriage or twenty-one. And then declares, that his will and meaning is, that the reſpective legacies of two hundred pounds a-year, and the ſix thouſand pounds, be taken and accepted of by his ſaid ſiſter and niece, in full ſatisfaction of all manner of claims and demands they or either of them had or might have upon any part of his eſtate, real or perſonal; and upon condition that they do releaſe unto his executors and truſtees all manner of claims and demands upon any part of his eſtate.

*[520] * Then he goes on and ſays: "Having thus provided for my "ſiſter and niece, I DO DEVISE all the lands purchaſed by me "ſince the making my will, to the truſtees in my will named, to "and for the ſame uſes and purpoſes as the manor of *Hanbury* "ſtands ſettled by my will. And I do hereby revoke that part of "my will wherein I make *A. B.* and *C.* three of my truſtees; "and I do deſire *J. S.* and *J. N.* to be two of my truſtees, and "do deviſe my ſaid real eſtate to them accordingly."

Upon this will and codicil, the firſt point inſiſted upon by *Mr. Atcherley* in right of his wife, ſiſter and heir at law to *Mr. Vernon*, was founded upon that part of the codicil, "I do thereby revoke, "&c."

IT WAS INSISTED, that he had by theſe words revoked that integral part of the will that related to the truſt, and the uſes thereby limited. Had he not intended to have done ſo, he would not have uſed thoſe words, "that part of my will," but would have uſed ſome other words that would have manifeſted his intention to have related only to the perſons of the truſtees. It was ſaid, that if he had intended only this, it was very ſtrange that he ſhould repoſe any truſt, as to the new-purchaſed lands, in thoſe very truſtees thus by him put out; yet that he plainly does, for he deviſes them to the truſtees in the will named, *viz.* all five. As the former meaning ſeems to be the more literal one, ſo it is the more favourable one to the heir at law, who will otherwiſe be diſinherited by the will. And it is likewiſe an interpretation that makes the codicil uniform and conſiſtent with itſelf. For immediately after this, there follows a new deviſe of all his eſtate to the two new truſtees; which clauſe, ſuppoſing the former not to be a revocation, is plainly inconſiſtent, and itſelf a revocation. And as there is no new truſt appointed by this new deviſe, the law implies that, and ſays, to the uſe of the heir at law. * But admitting, that the deviſe to theſe new truſtees, by virtue of the word "accordingly," ſhould

Where the words of a will are dubious, the heir at law to be favoured. 2. Vern. 340.

Where land is deviſed to truſtees, and no uſe declared, the law will imply it to be to the uſe of the heir.

*[521]

be

be taken to be, to and for the ſame uſes and purpoſes as are mentioned in the will; yet inaſmuch as the lands are deviſed to the truſtees, only omitting the words "and their heirs," they can take only an eſtate for life; and an eſtate for life cannot ſupport a uſe in fee; at leaſt the reverſion upon the eſtate of the truſtees for life will deſcend on the heir at law. ATCHERLEY *againſt* VERNON.

It being foreſeen by *Mr. Atcherley*'s Counſel, that the clauſe of the releaſe to be given by the ſiſter and niece would be urged as a plain proof that it was the teſtator's intention that his heir at law ſhould have nothing more; they endeavoured to obviate that objection by ſaying, that as the ſiſter had then a ſubſiſting demand upon the eſtate of *Mr. Vernon* (as it was admitted ſhe had), it was probable, that the releaſe was directed by the teſtator with a view to that only, and not to any further claim; it being very unlikely to ſuppoſe, that a man who is maſter of his own eſtate, and may diſpoſe of it where he thinks fit, ſhould order his heir to releaſe, in order to cut him off from the eſtate, when the very deviſing of it away does that as effectually as five hundred releaſes poſſibly can.

ON THE OTHER SIDE it was ſaid, by the Counſel for *Mr. Bowater Vernon*, that a revocation was no more to be preſumed than the diſinheriſon of an heir. That the only uſe of wills is the diſinheriting of heirs, and preventing that deſcent which would otherwiſe fall upon them. It is the buſineſs of all courts ſo to conſtrue a will, as that the whole may be conſiſtent; and revocations ariſing from inconſiſtencies will never be admitted but where the inconſiſtency is plain and unavoidable: * Therefore if, in the beginning of a will, land is deviſed to *J. S.* and afterwards in the ſame will, the ſame land is deviſed to *J. N.* the law will make them jointenants rather than the latter part ſhould be eſteemed a revocation of the former. But it is ſo far from being doubtful whether the teſtator did intend to revoke the diſpoſitions in the will by this codicil, that it is very plain, from the whole tenor of it, that he intended the contrary. In the very beginning of his codicil he takes notice of the making of this will, and then ratifies and confirms it. Then he makes an additional proviſion for his ſiſter and niece; and then directs that they accept the ſame "in full "ſatisfaction, &c,;" words that very plainly and ſtrongly import that he intended them nothing more. But if this intention of his can be plainer, he has made it ſo, by the releaſe he has directed them to give. For though, poſſibly, he might principally have in his view the demand he then knew his ſiſter had upon him; yet when ſuch general words are uſed as comprehend every thing, it amounts to a demonſtration, that he did not intend them the bulk of his eſtate. And it is not at all abſurd to ſuppoſe, that not being able to foreſee what diſputes might ariſe, what points might be ſtarted, how frivolous ſoever, he might even, to prevent theſe as far as in him lay, direct and appoint this releaſe. After this he goes on thus, "having thus provided for my ſiſter and niece, &c.:" For the defendant. * [522]

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words plainly again implying he never intended them any other proviſion. The expreſſion in the codicil, "three of my truſtees," plainly implies, that the teſtator thought there remained more truſtees who had truſts repoſed in them; all which could not be ſo upon ſuppoſition of a revocation. The following expreſſion, "to be two of my truſtees," corroborates the foregoing obſervation. * But this obſervation ſtands yet further ſtrengthened, from his appointing no new truſts for the new truſtees. For upon ſuppoſition that the teſtator did ſuppoſe, as it is evident he did, that his will was to continue, and that ſome of the truſtees in his will were to continue ſuch, and ſo the ſame uſes and purpoſes in the will mentioned, then was there plainly no occaſion to declare any new uſe, but the bare making them truſtees was abundantly enough; though if more were neceſſary, this one word "accordingly," being a relative word to the uſes in the will, is tantamount to the repeating them in the codicil. Beſides all this, his deviſing his lands purchaſed ſince the making of his will to the ſame uſes as his manor of *Hanbury* ſtands limited by the will, plainly proves, that the teſtator imagined that theſe uſes were continuing uſes; and that he was very well pleaſed with them. Add to all this, that by interpreting this to amount to a revocation, the proviſion of a thouſand pounds a-year made for his wife is quite overthrown, becauſe it takes away the fund out of which it is to ariſe.

* [523]

Not the ſame exactneſs required in the words of a will as in thoſe of a deed.

Salk. 621.

As to the objection taken from the omiſſion of the word "heirs," in the deviſe to the new truſtees, it was obſerved, that a will is always to be interpreted according to the intention of the party; and that there is no legal form of words whatſoever neceſſary in a will (as in a deed there is) to paſs a fee-ſimple; but whatever words make it plain the teſtator intended it, will be ſufficient for that purpoſe. And therefore here a fee ſhall paſs to the truſtees, without the word "heirs," becauſe it is impoſſible that any other eſtate could ſupport the uſes for which the eſtate was given them.

It is abſurd to the laſt degree to ſuppoſe a man ſhould, in one and the ſame breath, *viz.* the ſame codicil, ratify and confirm his will, and former diſpoſition of his eſtate, and then overturn all at once; and this in favour * of his heir at law, for whom he had been providing in this very codicil, and declaring very fully and expreſsly, that he intended nothing elſe at all for her. The meaning of *Mr. Vernon* is ſo full and clear, that no one but a lawyer could ever have miſtaken it. And after all, in order to miſtake it, it is neceſſary to vary from the literal meaning of his words; for had he meant and intended what the other ſide would have had him, he ought not to have ſaid, I hereby revoke that part of my will, but that clauſe; for if it be aſked, What is that part of the teſtator's will whereby *A. B.* and *C.* are made truſtees, is not the anſwer barely their names? So that in a literal ſenſe, which is likewiſe the real and natural ſenſe, no part of the will is hereby revoked but that part of the will where theſe truſtees are named, *viz.* their

* [524]

names

names. The bare naming them made truſtees, and the revoking the naming of them puts them out of the truſt. ATCHERLEY *againſt* VERNON.

This point was clearly decreed by THE LORD CHANCELLOR in favour of *Mr. Vernon*.

In the arguing of this point, the caſe of *Vachel v. Vachel* (*a*) was cited by *Mr. Vernon*'s Counſel; where, upon a bill brought by the eldeſt ſon to have his diſtributory ſhare of the perſonal eſtate, it was decreed againſt him upon this ſingle circumſtance, that the teſtator, by giving him a ſhilling in ſatisfaction of every thing he might claim out of his eſtate, had manifeſted his intention to be, that he ſhould have nothing at all. Deviſe of a ſhilling to an eldeſt ſon, in ſatisfaction of all claims, held ſufficient to exclude him from his diſtributory ſhare of the teſtator's perſonal eſtate.

Another point inſiſted upon by *Mr. Atcherley's* Counſel was, that the fee-farm rent of thirty-five pounds a-year, iſſuing out of the manor of *Hanbury*, and purchaſed in by *Mr. Vernon*, did not paſs to the truſtees by the word "lands." 2d point. Whether a fee-farm rent ſhould paſs in a will by the word *lands*?

* [525]

* It was ſaid, that an heir at law is never to be diſinherited, but by very clear and plain words (*b*); that therefore the word "land" ſhould never be extended to comprehend fee-farm rents, to the diſinheriſon of an heir at law, unleſs where the word can relate to nothing elſe, and ſo otherwiſe be totally void. And upon that diſtinction went the caſe of *Inchly v. Robinſon* (*c*). The deviſor being ſeiſed of a fee-farm iſſuing out of the manor of *Fremington*, and of no other land whatſoever, deviſed his manor of *Fremington* to *J. S.* And it was there held, that the deviſe of the manor of *Fremington* were words in a will ſufficient to paſs the fee-farm rent iſſuing out of that manor; for the deviſor being ſeiſed of that rent, and nothing elſe in that manor, it was plain, that the teſtator meant the rent, and could mean nothing elſe: ſo that otherwiſe the will muſt have been entirely void. For the plaintiff. There muſt either be expreſs words in a will, or a neceſſary implication to diſinherit an heir at law. 2. Vern. 571. 3. Salk. 128. Where a deviſe of the manor of *F.* paſſed a fee-farm rent iſſuing out of that manor; becauſe otherwiſe the will muſt have been void, the teſtator being ſeiſed of nothing elſe in that manor but the fee-farm rent.

To THIS *it was anſwered*, by the Counſel for *Mr. Vernon*, that *Mr. Vernon* the teſtator being ſeiſed in fee of the manor of *Hanbury*, out of which this fee-farm rent did iſſue, had merged the rent in the inheritance, by taking a purchaſe of it to himſelf in fee. But it was further inſiſted upon, that ſuch a rent would very well paſs by the word "land." The caſe of *Inchly v. Robinſon* proves, that the word is ſufficient to paſs it, where the intention of the teſtator is plain that it ſhould paſs; for the word "land" is certainly as comprehenſive as the words in that caſe, *viz.* "the "manor of *Fremington*;" nor could the circumſtance of the teſtator's having nothing elſe to paſs more ſtrongly ſhew the intention of the teſtator that it ſhould paſs in that caſe than the releaſe in the preſent. Where a man had a portion of tithes in fee, For the defendant. Merger.

(*a*) (*c*) 2. Leon. 41. 3. Leon. 165.
(*b*) See Denn v. Gaſkin, Cowp. 661.

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held, that that ſhould paſs in a will by the words "all my free "lands." It is true, the teſtator had in that caſe nothing elſe; but that is a circumſtance of no weight, any * further than as it
* [526] ſerves to ſhew what the teſtator intended, which the releaſe directed does abundantly in the preſent caſe (*a*). The word "livelihood" will paſs land in a will. Fee-farm rent is extendible upon an *elegit*, and yet the words of the ſtatute that gave the ſheriff authority are only "*land*," *medietatem terræ*.

LORD CHANCELLOR. Merged in the inheritance, and purchaſed by the teſtator with a view that it ſhould be ſo. Beſides, the word "lands" is ſufficient to paſs it; eſpecially in a will, and where the intention of the teſtator is ſo very plain, as here it is, that it ſhould paſs.

3d point. Whether lands contracted for, but not conveyed, ſhould paſs by a deviſe in a codicil of all the lands purchaſed ſince the making the will?

ANOTHER POINT inſiſted upon by *Mr. Atcherley*'s Counſel was, that the lands contracted for where no conveyance was executed, and eſpecially thoſe lands where the very time fixed by the articles for executing conveyances was not come at the time of the making the codicil, did not paſs by it, and conſequently would deſcend to the heir at law.

It was admitted, that if there had been no other lands purchaſed ſince the making of the will, where the conveyances had been executed, there, poſſibly, rather than this clauſe ſhould be entirely fruſtrated, they ſhould paſs: and in that caſe, the vendor would in a court of equity be conſidered as a truſtee for the purchaſer; for

Maxim of equity.

equity always conſiders things that ought to be done in the ſame light as if they were done. But here, there being other lands purchaſed ſince the making of the will, where the conveyances have been executed, the words of the codicil being ſatisfied by thoſe lands ought not to be extended any further; eſpecially to the diſinheriting of an heir at law. Nay, in caſe there were no other lands, this rule of equity could be extended no further than to ſuch
* [527] purchaſes, where though no conveyances were actually * executed, yet the time fixed by the articles for the execution of them was paſſed; and then thoſe lands where the time limited for the executing of conveyances was not yet come will not paſs, but deſcend upon the heir. If the teſtator had intended otherwiſe, he might have made this very plain by expreſſing himſelf thus, "lands "ſince purchaſed or contracted for."

For the defendant.

IN ANSWER TO THIS *it was ſaid*, that upon all the circumſtances of the will and codicil taken together, nothing could appear plainer than that it was the intention of the teſtator they ſhould not deſcend to the heir at law, but paſs by the codicil. And if the intention be plain, it cannot be controverted but that the words made uſe of by the teſtator in the codicil, *viz.* "all the lands purchaſed "by me ſince the making my will," and "my ſaid real eſtate," are large enough to take them in.

(*a*) Stiles, 261.

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It was admitted by the Counſel of the other ſide, that the words would have paſſed them, in caſe there had been no other lands. And why is that? Only becauſe it would have been then evident the teſtator had intended them to paſs; and here the releaſe ordered by the teſtator ſpeaks this full as ſtrongly. ATKINSON *againſt* VERNON.

As to the difference taken between where the time limited for the executing of theſe conveyances is paſt, and where yet to come, nothing at all in it; for that relates only to the terms of the truſt repoſed by equity in the vendor. A material circumſtance, that in every one of theſe contracts part of the purchaſe-money was paid. A known and eſtabliſhed rule in equity, that from the time of the contract the vendor is a truſtee for the vendee. Upon this foundation it is, that a bill lies in equity againſt the vendor for a ſpecific performance. Nay, ſhould the vendor afterwards ſell this land to another, having notice of this precedent * contract, equity ſtill transfers the truſt; and the ſecond vendee may in ſuch caſe be compelled to a ſpecific performance. Theſe words "contracted for" and "purchaſed" are very commonly uſed promiſcuouſly. * [528]

Beſides, if this were not to be conſidered as real eſtate, then it muſt be perſonal eſtate, for there is no medium; and if ſo, it is given to the truſtees to be by them inveſted in land, and ſettled to the ſame uſes: but if it be to be accounted as real eſtate, and as ſuch deſcendible to the heir at law, then it is deviſable, and will paſs by the words of the codicil.

Caſes quoted to this purpoſe were, *Lingen v. Souroy*, in LORD HARCOURT's time: A man by his will gave all his land in the county of *York* and kingdom of *England*, and had no lands at the time of his death, but only had obliged himſelf by marriage-articles to purchaſe lands to the value of fourteen hundred pounds. And held that this fourteen hundred pounds ſhould be conſidered as real eſtate, and was well paſſed by the will. In that caſe, the caſe of *Atkins v. Atkins* (*a*), in LORD JEFFREYS' time, was quoted. Affirmed upon a re-hearing by Lord Chancellor Cowper. See Rep of Caſ. in Equity, 91. Ante, 39.

The caſe of *Woodier v. Greenhill* (*b*): Freehold land was deviſed to truſtees; the land was contracted for before the will, *viz.* in *April*; the will was made in *June*; time fixed by articles for the conveyance was at *Michaelmas*; yet held, by LORD HARCOURT, that the land paſſed; he being of opinion, that had the teſtator died before the conveyance, and made no deviſe of it, the heir might have claimed it as land, and compelled the executor to have paid for it out of the perſonal eſtate; and conſequently, if the deviſor had ſuch an intereſt in the land contracted for as was deſcendible, it was deviſable. And *Mr. Vernon* the preſent teſtator, being of Counſel in that caſe, inſiſted very much upon the abſurdity of ſuppoſing it neither real nor perſonal eſtate; * for if perſonal eſtate, it muſt not deſcend to the heir, which all held it would; if real eſtate, and conſequently deſcendible, then it was well deviſed. 2. Vern. 677. Rep. of Caſes in Equity, 77. * [529] Whatever is deſcendible to the heir at law as real eſtate, is deviſable as ſuch.

(*a*) (*b*) 1. Eq. Abr. 174. 2. Vern. 679. Rep. Eq. 77. Prec. Ch. 320.

Caſe

ATCHERLEY *againſt* VERNON.

Caſe of *Prideaux v. Gibbon* (*a*): A man having contracted for an eſtate, deviſes all his land to be ſold for the payment of his debts; and after the making of the will, the land was actually conveyed to him in purſuance of the antecedent contract: the Court decreed the land to be ſold for the payment of his debts. And if the teſtator had power to deviſe an eſtate contracted for, before conveyance, for the payment of his debts, he might certainly have deviſed it in any other manner. Said in that caſe, by the Lord Chancellor, that where a man deviſes his land to be ſold for payment of his debts, and he afterwards purchaſes lands, equity will decree a ſale, though there were no articles entered into precedent to the will.

THE LORD CHANCELLOR was of opinion, that all the lands contracted for by the teſtator, as well as thoſe which had been actually conveyed to him, did paſs by the codicil.

Copyhold lands deviſable without a ſurrender, if the teſtator has only an equitable, and not the legal eſtate. 2. Vern. 680.—See the ſtate of the caſe, ante.

THEN *Mr. Atcherley's* Counſel inſiſted, that the copyhold land did not paſs by the codicil. But held clearly that it did.

Whether manuſcripts ſhould deſcend to the heir at law?

THEN it was inſiſted upon by *Mr. Atcherley*, that ſome manuſcript reports of caſes in chancery, found in the *London* houſe, did belong to the heir at law, as guardian of the reputation of his anceſtor. It was ſaid, that if the tomb or monument of an anceſtor be defaced or deſtroyed, an action lies for the heir at law; and that by parity of reaſon, as thoſe manuſcripts were intended by the teſtator as a monument to tranſmit his learning and reputation to poſterity, the law would intruſt the heir with the care of * them, that they ſhould be printed in ſuch a manner as would be moſt for the honour of *Mr. Vernon*'s memory. The printing, or not printing, theſe papers, may as much affect the reputation of *Mr. Vernon* as any monument or tomb. Poſſibly, they are not fit to be printed; poſſibly they were never intended to be printed. This is not in the nature of the thing fructuary; and will not therefore fall within that clauſe that gives the reſidue of the perſonal eſtate to the truſtees. Suppoſe a man of learning ſhould have the misfortune to die in debt, Can the creditors come into this court and pray a diſcovery of all his papers, that they may be printed for the payment of his debts? And if creditors cannot do this, *à fortiori* not the truſtees in the preſent caſe. If a miniſter of ſtate ſhould die, he may have a great number of papers that may be very curious, may print, and ſell well; yet ſurely theſe will not be conſidered as perſonal eſtate, and go to the executor. As therefore papers found in a man's ſtudy, not being in their nature fructuary, are not conſidered as perſonal eſtate, and in caſe of no will would not have gone to the adminiſtrators of *Mr. Vernon*; ſo it was argued, that they did not paſs under that clauſe where the reſidue of his perſonal eſtate is given to the truſtees. It was reſolved in the

* [539]

(*a*) 2. Chan. Caſes, 144.

Earl

Earl of Northumberland's Caſe (*a*), that notwithſtanding all his jewels were deviſed to his lady, yet his garter and collar of SS ſhould go to the heir. ATCHERLEY *againſt* VERNON.

ON THE OTHER SIDE it was ſtrongly inſiſted upon, that it was perſonal eſtate, and was deviſed to the truſtees by thoſe words, "the reſidue of my perſonal eſtate."

* IT WAS INSISTED *in behalf of the widow*, that ſhe ought to have them, as included in the deviſe of "houſhold goods and furniture." * [531]

THE COURT decided nothing in this affair, becauſe all conſented to have them printed under the direction of the Court, without making any profit of them.

Thoſe points being thus determined againſt *Mr. Atcherley*, *Mr. Vernon*'s Counſel, in virtue of a croſs-bill brought for that purpoſe, prayed, that the Court would decree *Mrs. Atcherley* and her daughter to releaſe in the moſt effectual manner, or elſe to waive their legacies; for which the caſe of *Thorold v. Thorold* (*b*) was cited.

This, as highly reaſonable, was directed by THE COURT.

THERE WAS ANOTHER POINT conteſted by *Mrs. Vernon* the widow, which was this: *Sir Anthony Keck*, *Mrs. Vernon*'s father, did, by his will made in 1695, deviſe the ſum of two hundred pounds to his daughter, *Mrs. Vernon*, in theſe words, *viz.* "to be "by her laid out in what ſhe ſhall think fit in remembrance of "me." He gave alſo another legacy of fifty pounds to the deceaſed *Mr. Vernon*, and made him one of his executors.

A legacy of 200l. given to *V.*'s wife by her father, to be laid out by her in what ſhe ſhould think fit in remembrance of him. Decreed, ſhe ſhould have the 200l. over and above the proviſion made for her by her huſband's will.

It was ſaid, that taking all thoſe circumſtances together it muſt be intended, that the teſtator did plainly deſign this as a legacy to the ſeparate uſe of his daughter, though he does not uſe thoſe very words; and therefore, as the teſtator never deſigned that this money ſhould be ſunk in the eſtate of her huſband, the eſtate of the huſband ought to be ſtill liable to this demand, in the hands of the truſtees.

And IT WAS DECREED accordingly for *Mrs. Vernon*. * [532]

* NOTE, It is a point of law very well known, that if a man deviſe all his perſonal eſtate, and die worth double the perſonal eſtate he had at the time of the making the will, all his perſonal eſtate will paſs. But if a man deviſes all his real eſtate, no land purchaſed after the making of the will ſhall paſs by it.

A deviſe of all the perſonal eſtate will paſs whatſoever perſonal eſtate the teſtator dies poſſeſſed of.

This difference THE LORD CHANCELLOR was pleaſed thus to account for, that the ſtatute which made lands firſt deviſable (*c*) uſes theſe words, a man "having lands." So that the parliament ſeemed to conſider deviſe as another inſtrument of conveyance; and therefore the rule has always been, that a man can deviſe nothing but what he might by deed convey.

The reaſon of this difference in deviſes of real and perſonal eſtate.

(*a*) Owen, 124.
(*b*)
(*c*) Stat. 32. *Hen.* 8. cap. 1. and ſtat. 34. & 35. *Hen.* 8. cap. 5.

Quære,

ATKERSLEY *againſt* VERNON.

Quære of this. For admitting that a will is to be conſidered as a conveyance, yet like other conveyances that are not eſteemed valid until ſealed and delivered; ſo a will ought not to be reputed as a will until the death of the teſtator, when it takes effect; and it might not ſeem unreaſonable to conſider a will as wrote every day of a man's life that it lies by him unaltered.

2 Vern. 638.

The true reaſon of this difference, as ſeems to me, muſt be taken from the fluctuating nature of perſonal eſtate; ſo that death is the only time when this is capable of being reduced to a certainty; it being next to impoſſible to diſcover what the perſonal eſtate of the teſtator amounted to, or conſiſted in, at the time of making his will.

MICHAELMAS

MICHAELMAS TERM,

The Eleventh of George the Firſt,

IN

The Court of Chancery.

Earl of Macclesfield, *Lord Chancellor.*

Maſter of the Rolls.

* Oſgood *againſt* Stroud.

Caſe 235.

BY MARRIAGE-ARTICLES it was covenanted, that land ſhould be ſettled upon huſband for life, wife for life, then to the iſſue of that marriage in tail, remainder to the fourth ſon of the huſband's father. This fourth ſon died, leaving behind him a daughter married to the plaintiff, who brings his bill, the eſtate-tail being ſpent and no ſettlement made, to have the articles performed ſpecifically, by ſettling, &c. in oppoſition to the defendant, to whom, as heir at law, it would deſcend in caſe of no ſettlement.

If a father, in conſideration of marriage, ſettle an eſtate upon his firſt ſon for life, remainder to his wife for life, remainder to the iſſue in tail, with remainder to his fourth ſon in fee, the fourth ſon, on the death of the huſband and wife without iſſue, may compel a ſpecific performance of this ſettlement. Ante, 469. 471, 476.

IT WAS ARGUED *for the defendant*, that though theſe articles were founded upon the conſideration of marriage, yet they muſt be eſteemed voluntary for ſo much of them as that conſideration would not reach or cover; and a court of equity will not, in favour of volunteers, aid a defective ſettlement, much leſs decree one where there is none. * The plaintiff, who is a remainder-man after the limitation to the iſſue of the marriage, is certainly a volunteer; and then the queſtion is ſingly, Whether the Court will interpoſe ſo far in favour of a volunteer as to carry a covenant to ſettle into execution, to the prejudice of the heir at law, upon whom it would otherwiſe deſcend. That the Court would not the following caſes were cited: The caſe of *Robinſon v. Kirſaire* (*a*); the caſe of *Thompſon v. Lord Haverſham* (*b*), before LORD COWPER; the caſe of *Bellingham v. Louther* (*c*). This laſt caſe was much relied upon.

S. C. 2. Eq. Abr. 25. S. C. 2. Peer. Wms. 245.

FOR THE PLAINTIFF *it was ſaid*, that truſts, though voluntary, muſt be performed; that they may be created as well by articles

(*a*) Prec. Chan. 475. (*b*) (*c*) 1. Chan. Caſes, 243.

as

Osgood *againſt* Stroud.

as otherwiſe, and as well by marriage-articles as any other way; that here, there being a covenant to ſettle, &c. the queſtion was, Whether this not being performed by the anceſtor, an implied truſt to do this was not devolved upon the heir. In the caſe of *Jenkins v. Keymis*, reported both in *Hardres* (*a*) and the *Chancery Caſes* (*b*), it is expreſsly affirmed by Lord Chief Baron Hale, that the conſideration of a marriage-portion will extend and run through all the uſes in that ſettlement; and what conſideration would be good by way of ſettlement will be ſo by way of articles.

Macclesfield, *Lord Chancellor.* It ſeems clear to me, that where there is a marriage-portion and ſettlement, that part of the ſettlement only which belongs to the wife and children by that wife can be eſteemed to be founded upon the conſideration of that marriage; for it is abſurd to imagine, that the friends of the wife ſhould be ſuppoſed as at all concerned about the remote uſes of the ſettlement, upon perſons to whom they are entire ſtrangers. And as for the caſe of *Jenkins v. Keymis*, it ought * not to be underſtood in ſo abſurd a ſenſe as that comes to. The meaning of the caſe is no more than this, that a father, when he makes a marriage-ſettlement upon one ſon, has ſuch a proper, fair, and juſtifiable opportunity offered him of providing for his other children, as that if he thinks fit to lay hold upon and embrace it, by inſerting in the ſettlement proviſions for them, ſuch proviſion ſhall never be eſteemed as fraudulent, and as ſuch ſet aſide in favour of creditors. Therefore it is very plain to me, that the plaintiff muſt be conſidered as a volunteer, if there was nothing more in the caſe than the conſideration of the marriage and the marriage-portion. But upon ſuppoſition, that the eſtate was neither all in the father nor all in the ſon, ſo that neither could, without the aſſiſtance and help of the other, have made this ſettlement, then it may be very natural to ſuppoſe, that this part of the ſettlement, under which the plaintiff claims, might be founded upon an agreement between father and ſon. For it is very natural for the father to tell the ſon, "I "muſt provide for my other children as well as you; and there-"fore, unleſs you will conſent to this, I will not join with you in "making this ſettlement." And then this remainder-man, the plaintiff, muſt not be conſidered as a volunteer, but as one claiming under the conſideration of the father's doing that, to enable the ſon to make the ſettlement, which he was not bound to. This I take to be the ſtate of the preſent caſe; for by the evidence it ſeems to me, that the father had a power of charging the eſtate with the payment of thirteen hundred pounds, which probably he might depart from, upon the conſent of his ſon to that part of the ſettlement under which the plaintiff claims.

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Upon this reaſon, without determining the point that related to volunteers, he decreed a ſettlement to be made upon the plaintiff, purſuant to the articles (*c*).

(*a*) Hard. 395.
(*b*) Chan. Caſes, 103.
(*c*) Edwards *v.* Warwick, 2. Peer. Wms. 175. Neave *v.* Keck, 9. Mod. 106. Vernon *v.* Vernon, 4. Brown. P. C. 26. Goring *v.* Naſh, 3. Atk. 186. Stephens *v.* Trueman, 1. Vezey, 73. Roe *v.* Mitton, 2. Wilſ. 356.

TRINITY

TRINITY TERM,

The Eleventh of George the Firſt,

IN

The Court of Chancery.

King, *Lord Chancellor.*

, *Maſter of the Rolls.*

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* Hill *againſt* Filkins and his Wife.

Caſe 236.

A deviſe of land to a *Roman* Catholic, who is under eighteen years of age at the death of the teſtator and confirms within ſix months after attaining the ſaid age, is a good deviſe.

S. C. ante, 481.

S. C. 9. Mod. 154.

S. C. Caſes Ch. 22.

S. C. 2. Peer Wms. 6.

S. C. 2 Eq. Abr. 622. 624.

WHEN this caſe was before LORD MACCLESFIELD, he was ſtrongly of opinion for the plaintiff, the heir at law; but in order to bring the matter more fully before him, he made an order directing ſome iſſues to be tried.

From this order the defendant appealed to THE HOUSE OF LORDS, as having directed iſſues to be tried, that were not warranted by the pleadings.

The Houſe of Lords ſet the order aſide, but gave the plaintiff leave to amend his bill; which he did.

And upon this amended bill, and the pleadings thereupon, the point in law came now to be ſpoken to again before LORD CHANCELLOR KING, *viz.* Whether the grand-daughter, the defendant, having conformed by taking, &c. according to the act, &c. within ſix months after attaining the age of eighteen, was capable of taking the reſidue under this will; ſhe being about fourteen at the time of the death of the teſtatrix.

* KING, *Lord Chancellor*, clearly and ſtrongly decreed in favour of the defendant, contrary to the opinion of LORD MACCLESFIELD.—This act of parliament makes no difference as to the religion of thoſe from whom the eſtates come, whether proteſtants or papiſts; but regards only the religion, age, and circumſtance of thoſe to whom they come. In this caſe, it muſt be admitted upon the authority of the caſe of *Roper v. Radcliffe*, FIRST, that the *reſiduum* diſpoſed of by this will is land. SECONDLY, Upon the authority of that caſe, it muſt likewiſe be admitted, that the word "deviſe" is included in the word "purchaſe," in the ſecond clauſe of

Ante, 90 95. 234. 242.

HILL against FILKINS AND HIS WIFE.

of that act. And I think the Houſe of Lords were very right in that determination; becauſe otherwiſe, this clauſe in the act would in abundance of caſes have been entirely uſeleſs. But it does not from hence follow, that all deviſes whatſoever muſt be included under this word; without excepting even deviſes, that appear to me to be allowed of by the former clauſe, or rather the firſt part of this clauſe, for the whole is indeed but one clauſe. The legiſlators had two ſorts of perſons under their view; *viz.* perſons under the age of eighteen, and perſons over that age. As to the former, the legiſlators looked upon them as too young to be fixed upon rational grounds in any religion whatſoever; and therefore laid upon theſe only a temporary diſability, removeable upon conformity. But for perſons above that age, and who might be ſuppoſed fixed and riveted in their religious ſentiments, the legiſlators thought it to no purpoſe to expect their converſion; and therefore laid a total diſability upon them. * Not to underſtand the act of parliament in this manner, would be to make the legiſlators overturn their plain and apparent intention in the firſt clauſe, by the ſecond. The defendant therefore is plainly capable of taking by deviſe under this will, being under the age of eighteen, at the time of the death of the teſtatrix; and having performed thoſe external acts that were pitched upon by the parliament as a ſufficient proof of her conformity.

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A TABLE

A TABLE OF PRINCIPAL MATTERS CONTAINED IN THE TENTH VOLUME.

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2. And where there have been particular reaſons to induce the Court to the exerciſe of that power, perſons ſo committed have been bailed during the ſuſpenſion of that act, 334

BAILIFF.

1. Difference taken between bailiffs and receivers, *Biſhop v. Eagle*, 25

2. If a bailiff enters a houſe with a writ of execution, any perſon may juſtify aſſiſting him, even without his command, *Templeman v. Cook*, 25

BANKRUPTS.

1. The commiſſioners of bankruptcy put by the ſtatute into the place of the bankrupt, as to the management of his eſtate, *Miles v. Williams*, 244

2. And the aſſignees have the ſame remedy to recover the bankrupt's debts, that the bankrupt himſelf had, *Miles v. Williams*, 244. 246

3. Debts owing to the wife before coverture, aſſignable upon the bankruptcy of the huſband, *Miles v. Williams*, 164. 244, &c.

4. And, *vice verſa*, a creditor of the wife's before coverture, is a creditor of the huſband's within the ſtatute of bankruptcy, and ſhall be let in for an equal proportion of the bankrupt's eſtate with the reſt of the creditors, *Miles v. Williams*, 247

5. Conſequently debts owing by the wife before coverture are all diſcharged by the bankruptcy of the huſband, *Miles v. Williams*, 160, &c. 243, &c.

6. And that for ever, though the wife ſhould ſurvive the huſband, 247

7. Yet where a woman puts her eſtate, precedent to her marriage, into truſtees hands, for her ſeparate maintenance, her debts ſhall not be diſcharged by the bankruptcy of her huſband, *ibid.*

8. But ſuch ſettlement or conveyance, *quoad* the creditors, ſhall be deemed void and fraudulent, *ibid.*

9. The

9. The aſſignees of bankruptcy ſhall not be preferred before a mortgagee or purchaſer precedent, though by defective conveyances, *Cock v. Goodfellow*, 492

10. A deed of truſt made by a mother, for ſecuring juſt debts owing to children, at a time ſhe had fears of becoming a bankrupt, though two months before ſhe actually was ſo, decreed to be good againſt the aſſignees of bankruptcy, *Cock v. Goodfellow*, 489, &c.

11. What deeds ſhall be eſteemed fraudulent, ſo as to amount to an act of bankruptcy within ſtat. 1 *Jac.* 1. c. 15. and what not, 493, &c.

12. *A.* ſends up out of the country to *B.* a quantity of goods; *B.* apprehenſive he ſhould ſoon be a bankrupt, delivers a quantity of goods (moſtly the ſame) to *C.* for the uſe of *A.* but before *A.*'s acceptance becomes bankrupt. *Reſolved* by the Judges of *B. R.* That the property of the goods was ſo veſted in *A.* even before his acceptance, by the delivery of them to *C.* for his uſe, that they were not ſubject to the diſpoſal of the commiſſioners of bankruptcy, *Atkin v. Berwick*, 432

BAR.

1. How pleas in bar muſt conclude, 112. 160. 192. 211. 243. 247, 248. 323, 324

2. Pleas in bar may be ſupported by common intendment, *Stone v. Tavener*, 330

3. Where the bar is inſufficient, and yet it appears upon the whole record, that there is no cauſe of action, Whether the plaintiff ſhall have judgment? *Aubrey v. Forteſcue*, 206

4. Where the defendant's plea in bar may cure the plaintiff's defective declaration, *Parker v. Langley*, 210

5. If two actions are brought in different courts upon the ſame promiſe, though for different ſums, one action may be pleaded in bar of the other, *Aſhwood v. Woolley*, 286

6. In debt upon a judgment in *B. R.* writ of error pending in the Exchequer-Chamber, no plea in bar, *Goodwin v. Goodwin*, 17

7. "*Solvit ante diem*" cannot be pleaded in bar to debt upon bond, becauſe no material iſſue can be joined upon it, *Weddal v. Jocar*, 147. 267. 269. 304

8. Yet accord with ſatisfaction before the day may be pleaded, becauſe this being pleaded by way of excuſe, that ſuppoſes non-performance, and the defendant ſhall be obliged to prove his plea, *Weddal v. Jocar*, 304

BARGAIN.

1. Whether extravagant and unreaſonable bargains ſhall be carried into execution in a Court of Equity? *Lewis v. Lechmere*, 503

2. Bargain for the purchaſe of lands upon condition the vendor makes ſuch a titles as the vendee's counſel ſhall approve of, and the vendee's counſel diſapprove without reaſon, bargain good notwithſtanding, *Lewis v. Lechmere*, 503

BARGAIN AND SALE.

By the common law, nothing paſſed by deed of bargain and ſale but the uſe, and remedy was only in Chancery; but now ſtatute law has paſſed the eſtate to the uſe, *Lord Say and Sele's caſe*, 47

BARON AND FEME.

1. Huſband and wife are to many purpoſes in law conſidered as one perſon, *Brocas v. Savage* cited, 205

2. By the law of *England*, the wife ſhall ſhare in the honours and advantages, but not in the *pœnis et criminibus*, of her huſband, *Miles v. Williams*, 162

3. Where a *feme-covert* is puniſhable for crimes committed with her huſband, and where not, *Reg. v. Williams*, 63

4. The law upon marriage conſiders the debts owing by the wife as the debts of the huſband, *Miles v. Williams*, 163

5. So that a *feme-covert* may not be taken in execution for debts contracted before coverture, but the huſband, *ibid.*

6. But if the wife die, the huſband does not continue liable to the debts ſhe contracted *dum ſola*, 161. 163, 164

7. Neither, if the huſband die, is his executor chargeable with them, *ibid.*

8. A debt of the huſband's, and a debt contracted by the wife *dum ſola*, cannot be joined in one action brought againſt the huſband and wife, *ibid.*

9. An action brought againſt huſband and wife for a debt owing by the wife before coverture, muſt be in the *debet et detinet*, 163

10. The huſband may aſſign a debt due to his wife, *Miles v. Williams*, 245

11. If a note be payable to a *feme-ſole* or order, and ſhe afterwards marries, her huſband is the proper perſon to indorſe this note, 246

12. The huſband may releaſe a debt owing to the wife before coverture, 163

13. In what manner the releaſe muſt be given, 165

14. Yet a bond made to the wife *dum ſola*, will remain or ſurvive to the wife, 163. 165. 246

15. But if judgment be obtained during coverture, it ſhall go to the huſband's executors, 162

16. In like manner the huſband may releaſe his wife's ſhare of an inteſtate's eſtate, *Daeth v. Baux*, 63

17. And yet, if it be not releaſed, it is ſo much hers that ſhe ſhall have it by ſurvivorſhip, *Daeth v. Baux*, 64

18. Upon the outlawry of the huſband, the practice is to ſeize all the debts owing to the wife, *Miles v. Williams*, 245

19. Though a bond given to a *feme-ſole* is not forfeited by the outlawry of the huſband, *quære*, *Miles v. Williams*, 165

20. If a huſband ſeiſed in right of his wife had aliened by fine, it was a diſcontinuance at the common law, *Miles v. Williams*, 245

21. The huſband cannot ſue alone upon a bond given to the wife *dum ſola*, *Miles v. Williams*, 162

22. In what caſes a *feme-covert* may ſue or be ſued alone in the ſpiritual court, *Daeth v. Baux*, 64

23. The reaſon of the difference between the common and the civil law in this reſpect is, that in the ſpiritual court the huſband, though not named, may come in and plead *pro intereſſe ſuo*, ſhould the wife deſert the cauſe, *Clerk v. Lee*, 264

24. By cuſtom of *London*, a *feme-covert* that is a ſeparate trader, may ſue and be ſued as a *feme-ſole*, *Anonymous*, 6

25. The wife may continue her huſband's trade after his death, in caſe ſhe has lived with him ſeven years, *Reg. v. Morgan*, 70

26. Where a woman has power, by her firſt huſband's will, to ſell his land, and marries again before ſhe has executed this power, ſhe may nevertheleſs not only ſell the land, but even ſell it to her ſecond huſband, if ſhe ſee fit, *Thomlinſon v. Deighton*, 33

BASTARD.

1. Motion to quaſh an order of baſtardy upon divers exceptions, *Rex v. Miki*, 271

2. In caſe of baſtards, complaint not neceſſary to the giving juſtices of the peace juriſdiction, as it is in the caſe of poor, *Anonymous*, 85

3. Nor is the pariſh confined to any time for complaint, *Reg. v. Miles*, 271

4. Order of juſtices for the maintenance of a baſtard need not ſet forth, that it is likely to become chargeable to the pariſh; for nobody being bound to provide for baſtard children, the law preſumes they will become chargeable, *Anonymous*, 84

5. Order for the reputed father to pay ſo much *per* week for the maintenance of a baſtard till it be eight years old, adjudged good. *Sed quære: Anonymous*, 85

BILLS IN EQUITY.

If the defendant ſtand out all contempts till order made for ſequeſtration, the plaintiff may move to have his bill taken *pro confeſſo*, though the ſequeſtration be not ſealed or executed, *Anonymous*, 431, 432

BILLS OF EXCHANGE.

1. It is eſſential to a bill of exchange to be negotiable, *Joſſelyn v. Lacier*, 294

2. A bill drawn upon *B.* requiring him to pay *C.* ſeven pounds every month out of the growing ſubſiſtence of the drawer, adjudged to be no bill of exchange, *Joſſelyn v. Lacier*, 294. 316

3. Not the ſame ſtrictneſs required in penning of bills current between merchant and merchant, as in deeds, wills, &c. *Ormſton's Caſe*, 287

4. No difference between payable "*to the order of A.* and *to A. or order*;" but *A.* may maintain his action upon acceptance in the one caſe as well as the other, *Ormſton's Caſe*, 286

5. Acceptance of a bill is payment, and may be pleaded as ſuch in bar of an action of account, *Louviere v. Laubray*, 37

6. Where the drawee firſt accepts, and then proteſts a bill, he ſhall pay intereſt from the time of the proteſt, *ibid.*

7. If a bill be accepted, and afterwards indorſed to the drawer, he may maintain an action as indorſee, in caſe he had effects enough in the drawee's hands to anſwer the ſaid bill, *Louviere v. Laubray*, 37

8. *Otherwiſe* where the acceptance of the bill is only in honour of the drawer, *ibid.*

9. One draws a note upon a goldſmith, and ſends his ſervant to receive the money, and inveſt it in exchequer notes; the ſervant gets *B.* to give him money for the note, and then brings the exchequer bills to his maſter, and two days afterwards the goldſmith fails. Adjudged that the maſter muſt anſwer the money to *B.* for the property of the note was not transferred and veſted in *B.* but was only in nature of a *depoſitum* or ſecurity to him, ſo that he could not have ſued upon the bill, there being no indorſement, *Nickſon v. Broban*, 109, &c.

BISHOP.

If a biſhop ſeiſed in right of his church, had aliened by fine, it was a diſcontinuance at the common law, *Miles v. Williams*, 245

BONA NOTABILIA.

The ſpiritual and common law the ſame to *bona notabilia*, *Cottingham v. Lofts*, 272

BREACH IN COVENANT, DEBT, &c.

1. A general rule, that a breach is well aſſigned in the words of the condition, *Anonymous*, 443

2. Therefore where a *ſcire facias* on recognizance of bail aſſigned for breach, that he did not render himſelf in execution of the judgment, though theſe were improper words (ſince the principal only could render himſelf in execution of the judgment), yet, becauſe they were the very words of the condition, it was held upon error, that the breach was well aſſigned, and that the words ſhould be underſtood in the ſame ſenſe in the pleading as when uſed in the condition of the recognizance, *Anonymous*, 443, 444

3. In debt on bond to perform covenants, the breach aſſigned in the replication muſt be certain and ſingle; but *contra* in action of covenant, *African Company v. Maſon*, 227

4. Covenant by leſſee to lime and dung the land *durante termino*: the heir aſſigns for breach, that after the deſcent of the land he did not, *durante termino*, lime

lime and dung the land. But the Court held this to be no breach; becauſe the land might be limed and dunged ſo ſufficiently before the deſcent as not to need it afterwards, *Sale v. Kitchingham*, 158, 159

5. Covenant to defend and warrant goods ſold to the plaintiff *contra omnes perſonas*: breach, that at the time of the ſale the defendant had neither the poſſeſſion nor the property of the goods well aſſigned, *Hatchet v. Glover*, 142

6. Debt upon bond conditioned to perform covenants compriſed in ſuch an indenture, by which the defendant had bound himſelf to ſerve the *Eaſt-India Company* as their factor, and to account for ſuch of their goods as ſhould come to his hands, or the produce of them: breach, that ſo many rupees belonging to the Company came to his hands, which *illicitè et fraudulenter imbezilavit, et in proprium uſum, &c.* Reſolved upon demurrer, that this was no breach of the condition of the bond; becauſe a factor has power to uſe the ſtock of his principal, and to anſwer it out of his own, *Shepherd v. Maidſtone*, 144

7. Debt upon bond, conditioned, that if *A.* being an apprentice, ſhould purloin or embezzle any thing to his maſter's damage, &c.: breach, that he did purloin and embezzle 200l. well aſſigned; though not averred to be to the maſter's damage, for purloining and embezzling do import damage, *Thornicroft v. Bayes*, 149

BURGESS.

1. The office of burgeſs, or alderman, a public office that concerns the adminiſtration of juſtice, *Reg. v. Pomfret*, 108

2. Yet non-attendance at the ſeſſions held to be no good cauſe of removal, *ibid.*

BY-LAWS.

1. No by-laws that are unjuſt or unreaſonable can ever be good, *Mitchel v. Reynolds*, 133

2. By-laws to exclude foreigners from the exerciſe of trade are void, unleſs made in affirmance of a cuſtom, *Mitchel v. Reynolds*, 131. 135

3. And ſo are all by-laws intended to hinder trade, 131

4. But by-laws to regulate trade, are good; whether they be for the advantage of the town or of trade, *ibid.*

5. Whether the by-law in the city of *London*, that none but free porters ſhall intermeddle with the unloading goods, &c. under the penalty of 20s. be valid, or not? *Fazakerley v. Wiltſhire*, 338, &c.

6. A by-law reſtraining the number of carts in the ſtreets of *London* has been adjudged good, *Fazakerley v. Wiltſhire*, 339

C.

CAPIAS.

A *capias* lies for treſpaſs at common law,

CERTIORARI.

1. If an indictment be removed by *certiorari* from the ſeſſions into *B. R.* and the defendant is convicted, the proſecutor is entitled to his coſts by the ſtatute, *Reg. v. Maſcot*, 193

2. A *certiorari* to remove an indictment againſt *A.* will not remove one againſt *A.* and *B. Barnardiſton v. Fowler*, 205

3. The ſame law as to orders, *ib.*

4. No *certiorari* ever granted to Judges of *oyer and terminer* to remove a recognizance for appearance, *Rex v. Tomb*, 278

CHALLENGE.

1. Of ſuggeſtions upon record in the nature of challenges, *Reg. v. Delme*, 199

2. Though a challenge be *in eſſe* at the time of making a former, yet if the party had not by reaſonable intendment

ment notice of the cauſe of challenge, he is not eſtopped, *Reg. v. Delme*, 200

3. Where there are two ſheriffs, and only one is challenged, the *venire* ſhall be directed to the other, 199

4. But if both be challenged, the *venire* ſhall go to the coroner, *ibid.*

5. Upon an information againſt *D.* for exerciſing the office of alderman in *London*, the crown challenged the array by exception to one of the ſheriffs; afterwards the defendant challenging the array by exception to the other, and the *venire* being directed to the coroner, king's counſel entered a ſuggeſtion upon record, ſetting forth why it was impoſſible for an impartial jury to come out of *London*, and therefore pray a *venire* to the ſheriff of *Surry*, *Reg. v. Delme*, 198, &c.

CHANCERY.

1. Juriſdiction of the court of chancery is generally divided into fraud, truſt, and accident, *Earl of Bath v. Sherwin*, 1.

2. Truſts ſo entirely under the juriſdiction of chancery, that the courts of law can take no notice of them, *Ongly v. Peed*, 103

3. Chancery may not over-rule the maxims of common law, *Bath v. Sherwin*, 1

4. Never gave relief in the caſe of a collateral warranty, *Bath v. Sherwin*, 3, 4

5. Never ſaves from the penalty of a bond, before full ſatisfaction made to the obligee, both in reſpect to principal, intereſt, and coſts, 2

6. Will not hinder a man from trying his right by ejectment as often as he pleaſes, *Bath v. Sherwin*, 1, &c.

7. Though the court of chancery never directs more than two trials by ejectment, without ſome ſpecial cauſe be ſhewn, 3

8. When iſſue is joined in chancery, that court awards the *venire* returnable into *B. R. Reg. v. Aires*, 259

9. In caſe of an iſſue directed out of chancery on a *ſcire facias* brought for repealing a patent, the record ſhall not be remitted after trial into chancery, but judgment ſhall be given in *B. R. Reg. v. Aires*, 260

10. Writ *de excommunicato capiendo* iſſues out of chancery, returnable in *B. R. Rex v. Theed*, 351

11. The court of chancery have nothing more to do with this writ after once it is iſſued; ſo that the king's bench, and not the chancery, muſt be applied to for a *ſuperſedeas*, *ibid.*

12. Fees in chancery may be recovered at common law, *Clerk v. Lee*, 264

CHARTERS.

1. Conuſance of pleas may be granted by charter, but not to proceed by any other law than the common law, unleſs the charter be confirmed by act of parliament, *Caſe of Univerſity of Cambridge*, 125, 126. 129

2. Of the conſtruction of charters, *Reg. v. Sutton*, 75, &c.

CHURCH AND CHURCH-RATE.

1. Pariſhioners are taxable for building a gallery, *Forte v. Bewiere*, 13

2. An ancient church-rate may be continued as long as the pariſh pleaſes, till it becomes unequal, *ibid.*

CHURCHWARDENS.

1. Preſcription whether the whole pariſh or a ſelect veſtry ſhall chuſe churchwardens, is a matter triable at common law by a jury, *Baniſter v. Hopton*, 12

2. Churchwardens ſhall be allowed the expences they are put to in collecting pariſh money, out of what they receive, and ſurpluſage in caſe their expences outbalance, &c. *Biſhop v. Eagle*, 23

3. For they are not to be conſidered as bare receivers, but as bailiffs, *ibid.*

4. Churchwardens receive money for the uſe of the pariſh where none is due, and upon diſcovery of their miſtake repay

repay the money: Whether, in an action of account brought againſt them by their ſucceſſors, they ſhall be allowed to plead this before auditors after judgment *quod computent*; or whether they ought to have pleaded this matter ſpecially in bar of the action, *Biſhop v. Eagle*, 22, 23

CIVIL LAW.

When the property of goods taken by the enemy is altered, and when not, by the civil law, *Aſſiſtedo v. Cambridge*, 78, &c.

COMMISSIONERS OF HACKNEY COACHES.

Uſual with theſe commiſſioners to convict upon ſummons without appearance, *Reg. v. Simpſon*, 344

COMMISSIONERS OF SEWERS.

1. Order of commiſſioners of ſewers quaſhed, as exceeding their power, *Rex v. Weſtham*, 159
2. What their power is, *ib.*

COMMITMENT.

1. A commitment for treaſon generally, without expreſſing the ſpecies of treaſon, good, *Harvey of Coomb's caſe*,
2. Perſons committed by rule of court, not intitled to the benefit of the *Habeas Corpus* act; *per* EYRE and FORTESCUE, *contra* PRATT, *Rex v. Lennard*, 429

COMMON-COUNCIL-MAN.

1. Is an office that is in law accounted a freehold, *Reg. v. Simpſon*, 380
2. And yet a man may be removed from it in his abſence, *ib.*

COMMON-PLEAS COURT.

1. The proper court to try the validity of a fine, *Lord Say and Sele's caſe*, 44
2. Fifteen days required in this court between the *teſte* and the return of a writ of inquiry, *Silk v. Hill*, 83
3. Otherwiſe in *B. R.* *ib.*

COMMON-PRAYER BOOK.

Before the Reformation there were almoſt as many common-prayer books as dioceſes, *Stationers' Company v. Partridge*, 105

COMMON RECOVERY.

1. Common recoveries favoured in law, eſpecially where they are ſuffered for a valuable conſideration, *Thornby v. Fleetwood*, 125
2. Though there be no tenant to the *præcipe*, yet a common recovery is good by way of eſtoppel againſt the party that ſuffered it, but not againſt remainder-men, ſtrangers, &c. *Lord Say and Sele's Caſe*, 45
3. Whether a tortious fee gained by entry, be ſufficient to maintain a recovery, *Thornby v. Fleetwood*, 124

CONDITION.

1. In wills, grants, or contracts, the law will interpret words not at all proper, to amount to a condition, rather than the intention of the parties ſhould be fruſtrated, *Turner v. Goodwin*, 189. 222
2. Covenant to pay ſo much money, the plaintiff making to the defendant ſuch an eſtate in ſuch land, and declared *licèt paratus, &c.* he had not paid the money: the defendant pleads, that the plaintiff had not made ſuch an eſtate; and reſolved upon demurrer, that this was a precedent condition, *Turner v. Goodwin*, 154
3. Debt upon bond, conditioned that if the defendant reſigned his living by ſuch a time, for a certain penſion to be conveyed to the parſon, then, &c. Conveying the penſion adjudged to be a precedent condition, 14. *Hen.* 4. *Turner v. Goodwin*, 223

4. Debt

4. Debt upon bond conditioned for the payment of 1500l. the plaintiff aſſigning over to the defendant ſuch a judgment. The Court was at firſt divided; but finally held, that the aſſigning the judgment was no precedent condition, but a concomitant act; and that the defendant could not juſtify non-payment without pleading a tender, though he was not bound actually to pay the money without the aſſignment, *Turner v. Goodwin*, 153, &c.

5. When a condition is in the diſjunctive, if one part of the condition becomes impoſſible by act of God, the obligor is diſcharged from the performance of the other part, *Sparrow v. Sowgate*, cited, 268

6. When a condition that is to create an eſtate cannot be literally performed, it ſhall be intended as performed by conſtruction of law, if the intent and meaning of the condition be obſerved, *Marks v. Marks*, 420

7. Where the benefit and advantage of a condition is in truth and effect paſſed over to a third perſon, notwithſtanding that maxim of law, that a ſtranger cannot take advantage of a condition, *Marks v. Marks*, 423

CONFESSION.

In convictions before juſtices of peace, the confeſſion of the party will ſupply the want of ſummons, *Rex v. Weſton*, 280

CONSIDERATION.

1. Where a grant is made upon a valuable conſideration, it ſhall give the fee, though the word "*heirs*" be not mentioned, *Lord Say and Sele's Caſe*, 47

2. Where the conſideration of a marriage ſettlement ſhall be conſtrued to extend to all the uſes in the ſettlement, and where not, *Oſgood v. Stroud*, 533, &c.

CONSPIRACY.

1. Conſpiracy is a formed action, *Jones v. Gwyn*, 219

2. Greater difference of opinions about actions of conſpiracy than any other ſpecies of actions, 219

3. Will lie for a malicious indictment, though the indictment was inſufficient, *Jones v. Gwyn*, 216

4. Will not lie without acquittal, *Parker v. Langley*, 146. 219

5. And formerly it muſt have been ſuch an acquittal as may be pleaded in bar to another indictment, *Jones v. Gwyn*, 216

CONTINUANCE AND DISCONTINUANCE.

1. A continuance is nothing but a *Curia adviſare vult*, *Taylor v. Mathews*, 325

2. If a defendant plead a plea in abatement, and the plaintiff reply as to a plea in bar, it is a diſcontinuance, *Alice v. Gale*, 112

3. Whether appearance and demurrer will aid a diſcontinuance, as well as appearance and pleading over, *Widrington v. Charlton*, 87

4. Coſts paid upon leave to diſcontinue, *African Company v. Maſon*, 228

CONTRACTS.

1. The validity of contracts can never depend upon ſubſequent contingencies; but muſt be either good or bad at the time they are made, *Earle v. Peale*, 67

2. In caſe of a contract for the ſale of land, the vendor is deemed in equity a truſtee for the vendee, till the conveyance is executed, *Atcherley v. Vernon*, 527

CONVICTION.

1. Conviction before juſtices for killing conies, in a warren *incloſed*, warranted by ſtat. 22. and 23. *Car.* 2. c. 25. *Rex v. Weſton*, 279, 280

2. Conviction of deer-ſtealing in the abſence of the offender, upon ſtatute 3. and 4. *W. & M.* adjudged to be good after ſummons, *Reg. v. Simpſon*, 248, &c. 341, &c. 378, &c.

3. "Between ſuch a time and ſuch a time he ſtole a deer," is a ſufficient ſetting forth the time of the offence in the information, *Reg. v. Simpſon*, 248, &c.

4. Nor is any greater certainty as to the time to be required in the proof, *ib.*

5. Witneſs ſworn *de veritate præmiſſorum*, not ſufficient in convictions; becauſe the nature of the evidence ought to appear to the Court, *Reg. v. Green*, 213

6. Yet oath made *de veritate præmiſſorum*, has been held ſufficient, *in margine*, *Reg. v. Green*, *ib.*

7. Whether *debitè ſummonitus* be a ſufficient ſetting forth of the ſummons, *Reg. v. Green*, *ib.*

8. A conviction upon ſtat. 5. *Ann.* c. 14. for preſervation of the game, quaſhed upon divers exceptions, *Reg. v. Mathews*, 26, 27

9. Conviction upon ſtat. 8. *Ann.* about the aſſize of bread, quaſhed for want of certainty in the charge; it being only ſaid, that the bread wanting ſo much weight was bought in the defendant's ſhop, whereas he ought to have been charged *directly* with the ſale of it, *Reg. v. Bradley*, 155, 156

CONUSANCE OF PLEAS.

1. Conuſance of pleas *triplex*, *Caſe of the Univerſity of Cambridge*, 129

2. Where courts have a concurrent juriſdiction, priority of ſuit gives the preference, *ib.*

3. Where conuſance of pleas is granted with excluſive words, the party impleaded may make the claim; otherwiſe only the lord, *Caſe of the Univerſity of Cambridge*, 127

4. Other differences taken between conuſance of pleas with and without excluſive words, 126, 127

5. Of the time of claiming conuſance, 127

6. The claim adjudged to come too late after imparlance, 129

7. It may be claimed notwithſtanding the ſuit is brought in the exchequer by *quo minus*, 128

COPYHOLD AND COPYHOLDER.

1. Copyhold lands deviſable without a ſurrender, where the teſtator has only an equitable and not the legal intereſt, *Atcherley v. Vernon*, 519. 529

2. Equity may ſupply a defective ſurrender, *Coventry v. Coventry*, 471

3. Or even decree one where there is none, *Cock v. Goodfellow*, 471. 498

4. But this ought to be done only in favour of purchaſers and creditors, *Coventry v. Coventry*, 471

5. Or of wife and children, who are conſidered in law as purchaſers and creditors, *Cock v. Goodfellow*, 497

6. A copyholder in fee, ſurrendered to the uſe of the mortgagee in fee, but before the preſentment of the ſurrender became a bankrupt. This defective ſurrender eſtabliſhed by LORD COWPER againſt the creditors, *Cock v. Goodfellow*, 492. 494, 495

7. A decree of LORD SOMERS's to ſupply a ſurrender in favour of a grandchild, reverſed in the Houſe of Lords, *Coventry v. Coventry*, 471

8. A defective ſurrender denied to be made good in caſe of a wife provided for before, *ib.*

CORPORATION.

1. A corporation muſt either be by charter or preſcription, *Reg. v. Corporation of Durham*, 147

2. Cannot ſubſiſt without a head, *Reg. v. Corporation of Banbury*, 346

3. So that if a mayor be not choſen within the time preſcribed by the charter, and there is no proviſion in the charter for the old mayor's continuing in his office till a new one be choſen, the corporation is diſſolved, *ib.*

4. Not in the power of the *quondam* corporation in ſuch caſe to revive itſelf by chuſing a new head, *ib.*

5. Whether

5. Whether they may be impowered by a writ under the great ſeal to proceed to a new election, 346

6. Or whether it be not neceſſary for them to obtain a new charter from the crown, *ib.*

7. Of the qualifications neceſſary to corporation officers, 65. 100

8. Whether the offices in a corporation are void, or only voidable when exerciſed by perſons not qualified by receiving the ſacrament, according to the ſtatute of *Charles* 2. *Reg. v. Whitehorn*, 65

9. Whether a power of diſfranchiſement be a power incident to every corporation; or whether it muſt be given by expreſs words in the charter, *Reg. v. Corporation of Buckingham*, 175

10. Whether a corporation can call the election of any of their members into queſtion after admiſſion, *Rex v. Buckingham*, 175. 181

11. And upon ſuppoſal they may, Whether they can expel members not qualified, without ſummons to make their defence, 101, 102

12. The acts of a corporation ſhall not be vacated for want of ſummons to ſuch perſons as are *de facto* diſfranchiſed, though ſtill members *de jure*, *Reg. v. Borough of Albrough*, 76, 77

13. Where, by the charter of incorporation, the mayor, recorder (or in his abſence deputy recorder), and capital burgeſſes, *vel major pars eorundem*, are impowered to chooſe capital burgeſſes; ſuch elections may be made without the preſence of the recorder (or his deputy); for the major *pars eorundem* refers not only to the capital burgeſſes, but to all the perſons before named, *Reg. v. Sutton*, 74, 75

14. And therefore though the preſence of the mayor be neceſſary to corporate acts, it is not becauſe he is particularly named, but becauſe he is the head of the corporation, *Reg. v. Sutton*, 75

15. If a charter require acts to be done by a majority of the corporation, no perſons can be removed but by a majority of the *whole* number, including the perſons to be removed, *Reg. v. Sutton*, 76

16. Where perſons elected are to be ſworn in before a majority of the corporation *tunc ibi præſentium*, Whether ſuch words make it neceſſary for this to be done before a majority of the whole number, or only with the conſent of the major part of ſuch as are preſent, *Reg. v. Sutton*, *ib.*

COSTS.

1. Coſts may be given in the ſpiritual court, *Clerk v. Lee*, 262

2. Coſts paid in debt upon bond, notwithſtanding tender and refuſal before action brought, *Playte v. Bandy*, 26

3. Motion, that the defendant ſhould pay coſts, becauſe a third perſon had claimed conuſance of the pleas, and was refuſed, not allowed, *Manners v. Pern*, 156

COVENANT or COVENANTS.

1. Bond conditioned for the payment of ſo much money to *H. H.* aſſigning over a *choſe in action* to the obligee. If the money be paid, and no aſſignment made, covenant will lie againſt *H. Turner v. Goodwin*, 223

2. Lies upon a covenant in law by *dimiſi*, without ſhewing an eviction, *Hacket v. Glover*, 143

3. Covenant that the leſſee ſhall quietly enjoy againſt all claiming, or pretending to claim a right in the premiſes, extends to all interruptions, be the claim legal or not; provided it appear, that the diſturber do not claim under the leſſee himſelf, *Chaplain v. Southgate*, 384

4. Where covenants relate to land, they run with it, and attend upon the reverſion, ſo that the heir may bring the action, *Sale v. Kitchingham*, 158

5. Covenants founded upon valuable conſiderations are looked upon by a court of equity in the ſame light as if they were actually performed, *Coventry v. Coventry*, 467

6. And in caſe there are any legal defects in the execution of ſuch covenants, they ſhall be aided by equity, *Coventry v. Coventry*, 467

7. Covenant for the ſale of lands, and after the money paid, the vendor before conveyance confeſſed judgment to a creditor. LORD COWPER of opinion this ſhould not affect the purchaſer, becauſe in equity the land is eſteemed to be ſold from the time of the covenant, *Coventry v. Coventry*, 468

8. *See* alſo *Cock v. Goodfellow*, 498

9. So where one covenants to ſell and convey, and dies before conveyance, equity will compel the heir to execute the ſale, *Coventry v. Coventry*, 469

10. *Otherwiſe*, if the vendor be tenant in tail, 469. 376. 478

11. Yet if one be tenant in tail, with a power to make leaſes for three lives, and covenants to make ſuch a leaſe, his covenant ſhall bind the heir, *Coventry v. Coventry*, 469

COURT OR COURTS.

An uniformity of practice in the courts of law to be wiſhed and endeavoured, *Holroi v. Ebizon*, 278

COURT OF HONOUR.

No ſuing for fees in this court, *Clerk v. Lee*, 264

CUSTOM.

1. All unjuſt and unreaſonable cuſtoms void, *Mitchel v. Reynolds*, 133

2. Yet a cuſtom for the advantage of a particular perſon to have the ſole uſe of a trade in a certain place, may be good, provided he has ſtock enough to ſerve the place, *Mitchel v. Reynolds*, 131

3. The ſame for a corporation, *ib.*

4. And perſons not ſuppoſed to uſe the trade, may yet by cuſtom have a prerogative *ratione domini*, that nobody ſhall uſe ſuch a trade within ſuch a compaſs, without licence from them firſt obtained, *Mitchel v. Reynolds*, 131

D.

DAMAGES.

1. One may be damnified either in perſon, reputation, or property; and each of theſe may be a juſt ground of action, *Jones v. Gwyn*, 217

2. But no action will lie *ad dammum, abſque injuriâ*, *Mitchel v. Reynolds*, 133

3. Whenever a man is kept out of a juſt debt, the law implies and ſuppoſes a damage, *Holroi v. Ebizon*, 277

4. And in every action of debt, damages are given by the common law *occaſione detentionis debiti*, *Holroi v. Ebizon*, 274

5. But where a penal ſum is recovered, damages are never given, *ib.*

6. Intereſt is *now* allowed by way of damages, for delay of payment, *ib.*

7. And where judgment is by default, the Court may give the damages, without a writ of inquiry, *ib.*

8. Motion upon ſtat. 3. *Hen.* 7. c. 10. that the defendant in a writ of error brought into *B. R.* ſhould be allowed intereſt by way of damages, from the time of the judgment in *C. B.* pending the writ of error, refuſed, *Holroi v. Ebizon*, 274, &c.

9. Damages and coſts are in law ſometimes uſed as ſynonimous terms, 275

10. Queſtion upon a prohibition to the ſpiritual court, Whether, the cauſe being originally of temporal conuſance, damages ought not to be given by the jury of inquiry, for all the proceedings from the beginning of the ſuit? But the Court was of opinion (only PRATT doubted), that damages ſhould be given for nothing more than the proceedings ſubſequent to the delivery of the prohibition, *Lee v. Carlton*, 319, &c.

11. The

11. The firſt new trial was granted for exceſſive damages, *Reg v. Helſtone*, 202

DEBET ET DETINET.

Where the action muſt be brought in the *debet et detinet*; and where in the *detinet* only, *Buckley v. Pirk*, 12

DEBT.

1. Definition of a debt, *Miles v. Williams*, 162

2. If debt be brought for a ſum of money, part whereof has been paid, the defendant cannot plead this in bar to the action, *Baldwin v. Church*, 324

3. Upon a *nil debet* pleaded, the jury may ſever in their verdict, and find part for the plaintiff, and part for the defendant, *Hadley v. Styles*, 7

4. If the declaration be for leſs than the action brought, this will be variance between the writ and the count, *ib.*

5. So if more appear to be due by the declaration than what was demanded in the writ, it is a good cauſe of demurrer, and cannot be helped by a *remittitur*, *Stafford v. Beneath*, 69, 70

6. For in actions of debt that lie for a ſum *certain*, no demand can be of a leſſer ſum, without ſhewing how the reſt of the debt is ſatisfied, *Hadley v. Stiles*, 7

7. *See* alſo *Stafford v. Beneath*, 69, 70

8. But where the action lies in damages, it is otherwiſe, *ib.*

9. In debt againſt an executor, the action muſt be brought for the whole ſum that is due, let the aſſets be ever ſo ſmall, that new actions may be prevented in caſe of an increaſe of aſſets, *Baldwin v. Church*, 324, 325

10. Debt will not lie for money and intereſt, *Holroi v. Ebizon*, 277

11. Lies againſt a gaoler for an eſcape, *ib.*

DECLARATION.

1. Where the declaration is the firſt ſtep in the action, it is erroneous, *Johnſon v. Altham*, 211

2. If a declaration be delivered generally of any Term, it has relation to the firſt day of the Term, *Bannaux v. Plaſted*, 340

3. But a ſpecial *memorandum* may be entered afterwards upon the record, to explain what day of the Term it belongs to, *Bannaux v. Plaſted*, *ib.*

4. And *that* without motion, *per* PARKER and PRATT, *contra* EYRE, *ib.*

5. Where the title is of one ſort of action, the declaration can never change it to another, *Parker v. Langley*, 210

6. But it may make a fatal variance between the writ and the declaration, *ib.*

7. The words uſed in a declaration ſhall ever be taken in the ſtrongeſt ſenſe againſt him who uſes them, *Child v. Peirce*, 331

8. And yet ſee where and how far they may be ſupported by a neceſſary intendment, *ib.*

9. Surpluſage in the declaration does no hurt, *Johnſton v. Gardner*, 254, 255

10. In tranſitory actions, the plaintiff may declare at any time or place, *Cole v. Hawkins*, 349

11. Only the time alledged muſt not be ſubſequent to the bringing of the action, *Cole v. Hawkins*, 251

12. Where an action is brought upon a deed dated in foreign parts, ſome place in *England* ſhould be alledged *pro formâ*, *Parker v. Crook*, 255

13. And yet when the plaintiff declared upon a deed dated at *Fort St. George in Indibus Orientalibus*, it was held well; becauſe the words *in Indibus Orientalibus* did not (it was ſaid) neceſſarily import the place to be out of *England*, *Parker v. Crook*, 255

14. Whether matters traverſable may not, in ſome caſes, be ſet forth only by way of *recital*; or whether they muſt be always *poſitively* averred, *Seſtern v. Cibber*, 191

15. Declaration by the aſſignee of a bail-bond held naught for want of averring the return of the writ, *ib.*

16. Whether in debt upon judgment in *B. R.* pending error in the exchequer chamber, the declaration ſhould be upon a record in *B. R.* or in exchequer chamber, *Goodwin v. Godwin*, 16, 17

17. In an action on the caſe plaintiff declared for incloſing ſo many acres of land, parcel *communiæ paſturæ*, and held well after verdict; though, in legal proceedings, the word "*communiæ*" generally ſignifies not the place, but the right of commoning, *Jackſon v. Laveright*, 184

DECREE.

1. A decree againſt a tenant for life will not bind the iſſue, *Coventry v. Coventry*, 480

2. A decree in chancery reverſed, *Coventry v. Coventry*, 471

3. A decree in the exchequer reverſed, *Lewis v. Lechmere*, 504

DEEDS AND CONVEYANCES.

1. Antedating deeds in ſome caſes felony, *Lord Say and Sele's Caſe*, 41

2. A deed when loſt by an inevitable accident, may be proved by a copy, *Edward Seymour's Caſe*, 8

3. But not by parol evidence, though there ſhould be no copy (*durum*), *ib.*

4. Yet held that parol evidence ſhould be allowed to ſhew the contents of a deed that was not loſt, but proved to be in the poſſeſſion of the other party, *ib.*

5. According to the common rules of indenture, the words of a deed are the words of all the parties, *Lord Say and Sele's Caſe*, 47, 48

6. Deeds are to be interpreted, as much as poſſible, according to the intention of the parties, *Lord Say and Sele's Caſe*, 47

7. The grantor's name omitted in the body of a *tripartite* deed, deed ſupplied by the intention, 45, &c.

8. It is a maxim of law, that a deed ſhall never be conſtrued void, if it can by any means be made good, *Lord Say and Sele's Caſe*, 46

9. Where the conveyance will not take effect the way it was intended, *there* rather than it ſhould have no effect, it ſhall paſs by another way than what the parties deſigned, *Thomlinſon v. Dighton*, 35

10. What deeds and conveyances ſhall be deemed void and fraudulent *quoad* creditors, and what valid, *Miles v. Williams*, 247. 489, &c.

11. Defects in voluntary conveyances not much favoured in equity, *Coventry v. Coventry*, 469

12. But equity will decree conveyances, or ſupply the defective execution of powers in favour of creditors and purchaſers, *Coventry v. Coventry*, 471

13. Or in caſe of making proviſion for younger children, *Coventry v. Coventry*, *ib.*

14. *See* alſo *Cock v. Goodfellow*, 497

15. In voluntary conveyances proviſion or no proviſion material, but not in thoſe founded on valuable conſiderations, *Coventry v. Coventry*, 478

DEFENCE.

1. Where no defence is made, the courts at law take the matter *pro confeſſo*, and give ſentence for the plaintiff, without obliging him to prove the truth of his caſe, *Bows v. Jurat*, 440

2. The ſame practice in the court of chancery, *Anonymous*, 431

3. But it is otherwiſe in the ſpiritual court, where proof is required, *Bows v. Jurat*, 440

DEMAND.

1. Whether, if debt be brought upon a note in a caſe where a demand is neceſſary, the action itſelf be not a demand, *Rumbal v. Ball*, 38

2. In eſcape brought againſt the marſhal of the king's bench, upon 8. and 9. *Will.* 3. c. 27. Court inclined to think the demand for producing the priſoner, no particular hour being appointed in the notice, ought to have been at the latter end of the day, and not

not at twelve o'clock, *Parks v. Crawford*, 396, 397

3. And likewiſe, that the demand ought to have been upon the deputy marſhal, and not upon a turnkey, *ib.*

4. But held, that in caſe of non-attendance, a demand at the priſon, though nobody there, would be ſufficient, *Parks v. Crawford*, *ib.*

DEMURRER.

1. Motion upon ſtat. 4. and 5. *Ann.* for leave to plead and demur at the ſame time, refuſed; becauſe a demurrer is no plea, but an excuſe for not pleading, *Haiton v. Jefferies*, 280, 281

2. There can be no demurrer upon a demurrer, *Haiton v. Jefferies*, 281

3. Such defects in pleading as are only matters of form, and would be cured by verdict, are now aided upon a general demurrer by ſtat. 4. and 5. *Ann.* c. 16. for amendment of the law, *Cole v. Hawkins*, 348

4. No advantage can be taken of a double plea upon demurrer, without ſetting forth in the demurrer, wherein the doubleneſs of the plea conſiſts, *Weddal v. Jocar*, 268

5. If one plead in bar to an action ſuch matter as goes but to part of the action, it is good cauſe of demurrer, *Baldwin v. Church*, 323, 324

6. Where a man has good cauſe of demurrer at the time of his demurring, no act of the other party afterwards will make it naught, *Stafford v. Beneath*, 69

7. Where the plaintiff has no way to help himſelf but by demurrer, *Weddal v. Jocar*, 267

8. If a defendant in debt upon bond, who has a good defence upon the merits, ſhould hazard and loſe his cauſe upon a demurrer, equity will not relieve him, *Barnardiſton v. Fowler*, 203

9. Debt againſt two executors, one of the defendants plea bad; plaintiff has good cauſe of demurrer to both pleas, *Baldwin v. Church*, 323, &c.

10. Though the demurrer be to ſeveral pleas, yet "*placitum prædictum*" in the ſingular number held well; for "*placitum*" is *nomen collectivum*, and to be taken *reddendo ſingula ſingulis*, *Baldwin v. Church*, 324

11. Demurrer to an appeal of murder for divers exceptions, *Widdrington v. Charlton*, 86

12. Debt upon bond conditioned to pay ſo much to *J. S.* and *J. N.* *tam cito* as they came of age; judgment, upon demurrer, for plaintiff, becauſe the defendant did not ſay *when* they came of age, *Stone v. Tavener*, 329

13. Debt upon bond conditioned to pay *J. S.* his executors, &c. the intereſt of 1000l. from time to time, as it ſhould become due. Defendant pleads he paid to *R. S.* *tantum quantum* became due. Judgment, upon demurrer, for the plaintiff, becauſe not ſhewn that *J. S.* was dead, and that *R. S.* was his executor, *Stone v. Tavener*, 330

14. Whether the plaintiff had not another cauſe for his demurrer, by reaſon of the defendant's not ſhewing what was due, nor what was paid, *Stone v. Tavener*, 329

15. Special demurrer to a replication, for concluding, "*Et de hoc ponit ſe ſuper patriam*," inſtead of "*Et hoc petit quòd inquiratur per patriam*," diſallowed, *Weltale v. Glover*, 166

16. Where the plaintiff had judgment upon a ſpecial demurrer, for want of the defendants concluding their plea in bar to the country, 160. 243. 247, 248

DEPARTURE.

1. Varying from things immaterially alledged, no departure, *Cole v. Hawkins*, 251

2. Therefore varying in the replication from the time or place laid in the declaration, is no departure in tranſitory actions, *Cole v. Hawkins*, 349

3. Though by the old books this would have been a departure, *ib.*

4. If, in debt againſt bail, the defendant pleads "no *capias*," and rejoins that the *capias* was ſuſpended by error, it is a departure, *Vincent v. Atwood*, 257

DEPOSITIONS.

Depoſitions in a chancery cauſe, though the bill and anſwer happen to be loſt, may be allowed as evidence to ſupply any point in a will, where the will is ſilent; but not to contradict it, *Cook v. Parſons*, 15

DESCENT.

1. The heir ſhall be eſteemed *in* by deſcent, where the land might poſſibly have veſted in the anceſtor, *Marks v. Marks*, 421. 425

2. Where an heir ſhall be *in* by deſcent of an eſtate, which could never veſt in the anceſtor, *Marks v. Marks*, 421

DEVISE.

1. Deviſe included in the legal ſenſe of the word "*purchaſe*," 92. 95. 234. 242. 483. 547

2. Deviſe of lands to the poor of a pariſh is a void deviſe, *Ratcliffe v. Roper*, 94

3. Where there is no deviſee at the death of the teſtator, *when* the will is to take effect, the deviſe is void, *Wodright v. Wright*, 371, 372. 421

4. Deviſe of lands to *A.* in tail, *A.* dies leaving iſſue male in the life-time of the teſtator, the deviſe is void, and the iſſue cannot take, *Lord Lanſdowne's Caſe*, 98

5. No difference in this reſpect between a deviſe in fee and in tail, *Lord Lanſdowne's Caſe*, 99

6. *See* alſo *Woodright v. Wright*. 374

7. Whether a republication of the will after the death of *A.* ſhall make a difference, 98, 99. 375, 376

8. Deviſe to *A.* in tail, remainder to *B.* and the iſſue of her body, remainder to the right heirs of *A.* for ever. *A.* dies without iſſue, living the teſtator; *B.* after the making of the will, has iſſue *C.* found to be heir at law to *A.* and dies likewiſe in the life-time of the teſtator. Adjudged a void deviſe, and conſequently that the deviſor's heir at law, and not *C.* ſhould have the land; thoſe words, *iſſue of her body*, and *remainder to the right heirs of A. for ever*, being held words of limitation, and not of purchaſe, *Woodright v. Wright*, 369, &c.

9. Deviſe to *A. B.* and *C.* to take ſucceſſively, void for the uncertainty, *Ongley v. Peel*, 104

10. *Aliter* where the deviſe was to *A.* and his two brothers *ſucceſſivè*; for in the caſe of brothers, the law directs who ſhall take firſt; and *here* the perſon named in the will was found by verdict to be the eldeſt brother, *Ongley v. Peel*, 103, 104

11. A latter deviſe, though void, is a revocation of a former, if inconſiſtent, *Ratcliffe v. Roper*, 94. 233

12. But revocations from inconſiſtencies will not be admitted, unleſs where the inconſiſtency is plain and unavoidable, *Atcherley v. Vernon*, 521

13. Therefore, if there be two deviſes in a will of the ſame lands, the law will make the deviſees joint-tenants, rather than the latter deviſe ſhould be eſteemed a revocation of the former, *Cartwright v. Cartwright*, 512

14. A deviſe of all the *perſonal* eſtate will paſs whatever perſonal eſtate the teſtator dies poſſeſſed of, *Atcherley v. Vernon*, 522

15. But by a deviſe of all the *real* eſtate, no more will paſs than what the teſtator had an intereſt in at the making his will, *ib.*

16. The reaſon of this difference, in the deviſes of *real* and *perſonal* eſtate, aſſigned by the lord chancellor, *ib.*

17. Another reaſon of this difference offered by the Author of the Reports, *ib.*

18. Whether the teſtator's manuſcript works will paſs by a deviſe of all the reſidue of his perſonal eſtate, *Atcherley v. Vernon*, 530

19. Whether they will paſs by a deviſe of houſhold goods and furniture, *Atcherley v. Vernon*, 531

20. Deviſe

20. Deviſe of a ſhilling to an eldeſt ſon in ſatisfaction of all claims, decreed ſufficient to exclude him from his diſtributory ſhare of the teſtator's perſonal eſtate not diſpoſed of, *Atcherley v. Vernon*, 524

21. A deviſe of the ſurplus of lands (to be ſold for the payment of debts and legacies) is in equity a *real* deviſe, 93. 237. 483. 537

22. In ſuch caſe the reſiduary legatees may pay the legacies, and pray to have the land, 91. 240, 241

23. If lands are devi'ed to be ſold for the payment of debts, and are of no greater value than what is ſufficient for that purpoſe, Whether the creditors may pray to have the lands, *Roper v. Ratcliffe*, 91. 94

24. A deviſe of the profits of land will even at *law* paſs the land itſelf, *Roper v. Ratcliffe*. 94. 287

25. Whatever is deſcendible to the heir at law as real eſtate, is deviſable as ſuch, *Atcherley v. Vernon*, 528

26. The word "*lands*" ſufficient to paſs a fee-farm rent; eſpecially where it appears to be the intention of the teſtator that it ſhould paſs, *Atcherley v. Vernon*, 526

27. Teſtator ſeiſed of a fee-farm rent iſſuing out of the manor of *F.* and of no other land, deviſed his manor of *F.* to *J. S.* Held, the fee-farm rent well paſſed, *Atcherley v. Vernon*, 525

28. Teſtator ſeiſed of a portion of tithes in fee and nothing elſe, deviſed all his *free lands*. Tithes paſſed, 525, 526

29. Land contracted for in *April*, teſtator makes his will in *June*, and deviſes his freehold lands to truſtees, time fixed by articles for the conveyances was at *Michaelmas*. Decreed by *Lord* HARCOURT the land paſſed, 528

30. Deviſe in a codicil of all the lands purchaſed ſince the making of the will. Decreed that all the lands contracted for, as well thoſe which had not been conveyed as thoſe which had, did paſs by the codicil, 526, *&c.*

31. *A.* deviſes all his land, *&c.* when he had no land, but only had obliged himſelf by marriage articles to purchaſe lands to the value of 1400l. Decreed by *Lord* HARCOURT, and affirmed upon a re-hearing by *Lord Chancellor* COWPER, that the 1400l. ſhould be conſidered as real eſtate, and was well paſſed by the will, 528

32. Where the teſtator deviſes his lands to be ſold for the payment of debts, equity will decree a ſale of the lands purchaſed afterwards, though there were no articles entered into precedent to the will, 529

33. Land deviſed to the wife of *J. S.* *J. S.* dies, the wife marries *J. D.* and then the deviſor dies. The wife of *J. D.* ſhall take the land, *Woodright v. Wright*, 371

34. Where a deviſe is to children, a grandchild cannot come in to take as one of the children, *Goodright v. Wright*, 376

35. A deviſe of lands to the heir after the death of the wife, gives by implication an eſtate for life to the wife, *Willis v. Lucas*, 417

36. *Otherwiſe* where the deviſe is to a ſtranger, *ib.*

37. *J. S.* having ſeveral ſons and daughters, deviſes his land to *H.* his youngeſt for the term of his life, he or his heirs paying ſuch and ſuch annuities to the reſt of the teſtator's children; and after the death of *H.* and his wife, to go equally among the ſons and daughters of *H.* Lord Chancellor of opinion, that the wife ought to have an eſtate for life by implication; and that the teſtator's eldeſt ſon and heir, who claimed the land (as not diſpoſed of by will) during the intervening time between the death of *H.* and the death of his wife, was excluded by the annuity. But this being matter triable at law, he directed an iſſue accordingly, *Willis v. Lucas*, 416, *&c.*

38. A deviſe of lands to wife for life, then to diſpoſe of according to her pleaſure, provided it be to ſome one of the teſtator's children, gives an eſtate

eſtate for life, with power to diſpoſe in fee, *Thomlinſon v. Dighton*, 31, &c. 71, &c.

39. A term was deviſed to *A.* for the term of his natural life, *and no longer*; remainder to ſuch of his iſſue to be begotten, as he ſhould deviſe the ſame unto; and if he ſhould die without iſſue, the reſidue of the term was deviſed to *B.* Deviſe over to *B.* good; for thoſe *latter* words "*die without iſſue*" are here to be underſtood in the vulgar ſenſe (*viz.* die without iſſue, "*living at the time of his death*"), and raiſe no eſtate-tail by implication to *A.* he having *before* an expreſs eſtate for life, with power, &c. *Target v. Grant*, 402, 403

40. A deviſe to *J. S.* for the term of his natural life only, without impeachment of waſte, then to the iſſue male of his body, remainder to the heirs males of the body of that iſſue. The deviſee made tenant for life, remainder to the iſſue in tail, *Backhouſe v. Wells*, 181, &c.

41. If a deviſe be made to *H.* and to the iſſue (or to *H.* and to the children) of his body, it paſſes an eſtate-tail, *Woodright v. Wright*, 376

42. But if the deviſe be to *H.* and after his death to his children, or his iſſue; the iſſue ſhall take by way of remainder, *Woodright v. Wright*, *ib.*

43. Deviſe to *J. S.* and his heirs, paſſes an eſtate in fee, 374, 375

44. No other difference between a deviſe in fee and in tail, but only that in the one caſe the deviſee has a greater choice and variety of ways to defeat the iſſue, than in the other, 374

45. A deviſe of lands to truſtees, though the words "*and their heirs*" be omitted, ſhall convey to them an eſtate in fee, if no other eſtate can ſupport the uſes deſigned by the teſtator in the deviſe, *Archerley v. Vernon*, 523

46. One deviſes his lands to truſtees and their heirs for the term of 500 years, for payment of 50l. *per ann.* to *A.* the eldeſt ſon of deviſor, during life; and after the determination of the ſaid term, then to the eldeſt ſon of *A.* in tail-male; remainder over to *B.* ſecond ſon of deviſor. *A.* has no iſſue at the time of the teſtator's death. Caſe ſtated, and ſent to the Judges of *B. R.* who certified their opinion to be, that the deviſe to the eldeſt ſon of *A.* was void; and that the remainder to *B.* was veſted in him upon the death of the teſtator. But the Lord Chancellor declaring, he thought the intention of the teſtator not to diſinherit the iſſue of his eldeſt ſon, ought to be ſupported if poſſible, and ordering the cauſe to ſtand over, the parties agreed it, *Gore v. Gore*, 501, 502

47. One deviſed land to his wife for life, remainder to his ſecond ſon *A.* in fee; provided and nevertheleſs, that if his third ſon *B.* ſhould within three months after the death of the wife, pay 500l. to *A.* then he deviſed it to *B.* and his heirs. *B.* dies after the teſtator, in the life-time of the wife. Decreed, the heir of *B.* might pay the money, and ſhould take the land as an executory deviſe, and by way of deſcent, *Marks v. Marks*, 419, &c.

48. Before *what time* an executory deviſe of a fee upon a fee was not allowed, unleſs upon a contingency to happen during the life of one or more perſons in being at the time of the ſettlement, *Marks v. Marks*, 422

49. But the law is *now* ſettled, that in caſe of a contingency, which cannot in the nature of it precede the death of a perſon, a reaſonable time may be allowed ſubſequent to the deceaſe of that perſon for the performance of the condition, and a fee limited thereupon is good, *Marks v. Marks*, *ib.*

50. In ſuch caſe a year has been held no unreaſonable time, *ib.*

DISABILITY.

1. Diſabilities by common law of three ſorts, *Thornly v. Fleetwood*, 359

2. Diſability *propter delictum*, *ib.*

3. Diſability *propter defectum ſubjectionis*, *ib.*

4. Diſability *cauſâ profeſſionis*, 369

5. Of diſabilities created by ſtatute, *Ratcliffe v. Roper*, 89

6. A

6. At the common law, no perſon allowed to void actions by pleading diſability in themſelves, *Miles v. Williams*, 161

DISCRETION.

1. *A.* by will diſinherits his ſon in favour of *B.* and tells *B.* if his ſon ſhould behave himſelf reſpectfully to him, and not diſturb him in the enjoyment of his eſtate, he might, if he thought fit, give him twenty or forty pounds *per quarter*. Decreed, that *B.* ſhould pay the forty pounds *per* quarter to the ſon, notwithſtanding he had firſt brought an ejectment at common law againſt *B.* and after that a bill in equity, *Nab v. Nab*, 404

2. A daughter deviſes all her perſonal eſtate to her mother, to diſpoſe of as ſhe ſhould think fit, and tells her mother, "*You may, if you pleaſe, give 180l. to my niece, but I leave it entirely to you.*" Decreed, the mother ſhould be eſteemed a truſtee for the niece, and ſhould pay her the 180l. (but without intereſt) notwithſtanding general miſbehaviour alledged in the niece, *Nab v. Nab*, 404, 405

3. But held the truſt might have been forfeited, had particular inſtances of miſbehaviour been aſſigned, *Nab v. Nab*, 405

DISSEISIN AND SEISIN, DISSEISOR, DISSEISEE.

1. Seiſin implies a freehold, *Thornby v. Fleetwood*, 125

2. An entry in purſuance of a void leaſe, to be taken for a diſſeiſin, *Potter v. Pinkney*, 265

DISTRIBUTION.

The eſtate of an inteſtate made diſtributable by ſeveral ancient laws, almoſt in the ſame manner as it is now by the ſtatute of *Car.* 2. *Farrington v. Knightley*, 442

DOUBLE PLEA.

1. By ſtatute 4. and 5. *Ann.* for amendment of the law, the defendant in any action or ſuit may, with leave of the Court, plead double, if he ſhall think it neceſſary for his defence, *Haiton v. Jefferies*, 289

2. But it is the duty of the Court not to aſſiſt the defendant by giving leave to plead double, unleſs upon probable ground that the demand of the plaintiff *quoad* the defendant cannot be maintained, *Carrington v. Warren*, 335

3. Whether a defendant in error may have leave to plead double by virtue of this ſtatute, *Herſon v. Aglionby*, 326, 327

E.

ECCLESIASTICAL COURT.

1. The eccleſiaſtical court may proceed by their own rules, in matters of form, though not ſubſtance, even in thoſe things wherein they derive their juriſdiction from the ſtatute law, *Daeth v. Baux*, 64

2. Proctors cannot ſue in this court for fees, *Clerk v. Lee*, 264

3. But extortion in taking fees allowed to be tried here, *Clerk v. Lee*, 263

4. Some kinds of defamation not of ſpiritual conuſance, *Anonymous*, 71

5. If words of ſpiritual conuſance are ſpoken in a place where they are puniſhable by virtue of any particular cuſtom, the juriſdiction of the ſpiritual court is taken away, *Aſgill v. Hunt*, 439, 440

6. The trial of a cuſtom may not be permitted in the ſpiritual court, becauſe the proof required there is very different from *that* required at common law, *Bows v. Jurat*, 441

7. Though a preſcription concerning the right of chooſing churchwardens, be a matter triable at common law by a jury, yet ſentence muſt be given in the ſpiritual court, *Baniſter v. Hopton*, 12

8. Ap-

8. Appeals are to be made within fifteen days after ſentence, by ſtatute 24. *Hen.* 8. c. 12. *Savil v. Kirby*, 386

9. In what caſes, and how far, the eccleſiaſtical and temporal courts may exerciſe a concurrent juriſdiction, *Savil v. Kirby*, 385, 386

EJECTMENT.

1. Ejectment is a poſſeſſory action, *Rex v. Corp. of Buckingham*, 177

2. Yet unleſs the perſon turned out (though by one that had no right) can prove his title, he ſhall not recover, *ib.*

3. It is a maxim of common law, that a man may try his right by ejectment as often as he pleaſes, *Bath v. Sherwin*, 2

ELECTION.

Where and how far equity will determine the election the party hath at law, 462. 487. 489

ELEGIT.

1. An *elegit* which ſet forth judgment to have been given on the 9th of *January*, when in fact it was given upon the 23d of *October*, and ſigned the 9th of *January*, denied to be amended, *Dummer's Caſe*, 67, 68

2. Where an *elegit* was held amendable, 68

EQUITY.

Where the intention of doing a thing plainly appears, want of circumſtances ſhall not avoid the act in equity, *Coventry v. Coventry*, 467

ERROR.

1. A writ of error is a writ of right, *Holroi v. Ebizon*, 275

2. It is a remedy given the party by the common law, *Hammond v. Webb*, 282

3. Writs of error into the exchequer chamber are given by ſtatute 27. *Eliz.* c. 8. *Holroi v. Ellmon*, 275

4. Where a writ of error varies from the record, the record is not removed, *Cook v. Hamilton*, 367, 368

5. Difference, as to the removal of the record, when writs of error are of judgments given in the ſuperior courts, and when in the inferior, *Goodwin v. Godwin*, 17

6. No diminution can be alledged of records out of the inferior courts,

7. In debt, if the writ of error be *de placito debiti* generally without diſtinguiſhing whether bond, &c. it is ſufficient, *Shipley v. Shipley*, 226

8. So in treſpaſs, *ib.*

9. The ſame in dower, *ib.*

10. *Where* want of abridgment was aſſigned for error in a writ of dower, and not allowed, *ib.*

11. Want of an original was aſſigned for error in an action of debt, and upon the return to a *certiorari* it appeared, that the original was a *quare clauſum fregit*. Court of opinion, the judgment ſhould be reverſed becauſe of an ill original, *Dorſet v. Chaplin*, 318, 319

12. *Where* the want of fifteen days between the *teſte* and the return of the writ ſhall not be cauſe of error, *Silk v. Hill*, 82

13. Matter pleadable in abatement may not be aſſigned for error in fact, *Gravenor v. Stephens*, 166

14. In caſe without writ or bill, where the plea, as to the matter of it, was in abatement, but concluded as a plea in bar, *petit judicium de narratione*, error inſiſted upon, that there ſhould have been no final judgment, but a *reſpondeas ouſter*, diſallowed, *Johnſton v. Altham*, 192. 210

15. *Aſſumpſit* brought by an executor upon two promiſes made to the teſtator, and one to himſelf; and after a *remittitur* entered upon the two firſt promiſes, and judgment obtained on the third, error aſſigned that the probate was void, as appearing upon *oyer* to have been dated four months before the time alledged for making the promiſes to the teſtator. But the Court held,

held, that thoſe promiſes having been yielded naught by the *remittitur*, the probate ſhould be deemed good, and the time of the promiſes taken, *Nutton v. Crow*, 170, 171

ESCAPE.

1. Eſcape brought againſt the marſhal of the king's bench priſon, upon ſtatute 8. and 9. *Will.* 3. c. 7. *Parks v. Crawford*, 394, *&c.*
2. One day's notice in writing to be given for producing the priſoner, *Parks v. Crawford*, 394
3. Whether the particular time of day, as well as the day itſelf, ought to be ſpecified in the notice, *Parks v. Crawford*, 395, 396

ESTATE.

1. An eſtate in fee-ſimple, tail, or for life, by what words of a will it may be created, *ſee* DEVISE.
2. Of veſting and reveſting of eſtates, 360, *&c.* 366. 412, *&c.*
3. Where, and by what means, an eſtate of inheritance once veſted may be turned into a mere poſſibility, *Thornby v. Fleetwood*, 412, 413
4. A future intereſt in an eſtate of inheritance will deſcend to the heir, *Marks v. Marks*, 421
5. A power to diſpoſe of an eſtate in fee, may be executed in tail, *Thomlinſon v. Dighton*, 31. 71

ESTOPPEL.

No eſtoppel will bind the crown, *Reg. v. Delme*, 200

EVIDENCE.

1. If a plaintiff in chancery make any one a defendant without cauſe, he ſhall not be allowed the benefit of his evidence, *Gibſon v. Albert*, 19
2. But it is otherwiſe in the caſe of truſtees; for the plaintiff may make uſe of their evidence, though they be defendants, becauſe it is neceſſary to make them ſo, *Gibſon v. Albert*, 20
3. Where there are ſeveral defendants in chancery, each of them may make uſe of the evidence of the reſt, *Gibſon v. Albert*, 19
4. The chirograph of a fine ſhall not be falſified by parol evidence, *Lord Say and Sele's Caſe*, 42
5. Nor by the date of the concord, though *that* be matter of record, *Lord Say and Sele's Caſe*, 43, 44
6. Parol declarations not to be allowed (*ordinarily*) as evidence to explain wills, *Lord Lanſdowne's Caſe*, 99
7. No regard to be had to them in a deviſe of lands, *Willis v. Lucas*, 418
8. Lands deviſed to *A.* in tail, who dies in the life-time of the teſtator, leaving iſſue male, and then the will is republiſhed. Parol declarations of the teſtator offered in evidence, to prove it was his intention, that the iſſue male of *A.* ſhould take by the will; but refuſed, *Lord Lanſdowne's Caſe*, 99
9. Law the ſame, even where the parol declaration is referred to by the will, *ib.*
10. Yet parol evidence may be admitted to explain a will in affirmance of the common law, and to ouſt a rule in equity, *Lord Lanſdowne's Caſe*, 99
11. Therefore where the *reſiduum* was undiſpoſed of, parol evidence was received, to prove the teſtator did deſign his executor ſhould have it, *Powell's Caſe*, 400
12. And parol evidence is good in wills by way of averment, where two things or two perſons are of the ſame name; and *that* in the caſe of real deviſes, *Lord Lanſdowne's Caſe*, 100
13. The copy of a revocation of the deputation to an office, offered in evidence of the revocation, diſallowed; becauſe it did not appear but the original might have been produced, *Reg. v. Sutton*, 74
14. A copy of the condemnation of a ſhip in the admiralty court of *France*, was offered in evidence at *niſi prius*, *B. R.* but refuſed for want of the ſeal of the court, *Stennil v. Brown*, 108, 109
15. Copy

15. Copy of a rule of court, to make it evidence in any other court, must be signed by the Judge himself, *Stennil v. Brown*, 109

16. But at *nisi prius*, *where* it is the same court, it is sufficient if it be signed by the officer of the court, *ib.*

17. In what case no other evidence of an act of parliament shall be allowed, but an exemplification of it under the great seal, *Case of University of Cambridge*, 126

18. Many authorities in the court of chancery where bonds have been considered as evidences of agreements, *Parks v. Wilson*, 518

19. A bond conditioned for the performance of a marriage agreement. Decreed, the obligor should not be permitted to forfeit the penalty, but that the bond should be taken as an evidence of the agreement, *Hobson v. Trevor*, 507, &c.

20. A bond conditioned for the surrender of a copyhold upon the payment of 200l. Decreed to be taken as an evidence of an agreement for a surrendry on the part of the obligor, *Parks v. Wilson*, 515, &c.

21. What is given in evidence in one *action*, cannot be made use of as evidence in another, *Reeves v. Symonds*, 292

EXCOMMUNICATION.

1. A precedent conviction of the offender necessary to excommunication, even where the statute says he shall be *ipso facto* excommunicated, *Reg. v. Whiteborn*, 65. 179

2. *See* also *Reg. v. Buckingham.*

EXCOMMUNICATO CAPIENDO.

1. If a person remain forty days excommunicated, upon a *significavit* thereof to the court of chancery, the writ *de excommunicato capiendo* is issued of course, *Anonymous*, 71

2. *See* also *Rex v. Theed*, 352

3. But it must be opened in *B. R.* and delivered to the sheriff to be executed in the presence of the Judges, *Rex v. Theed*, 351, 352

4. And may be quashed before it is delivered, *Rex v. Theed*, 352

5. Though the practice is not to enter at large upon record the writs that issue out of *B. R.* before the *return*, yet this writ is always entered at large upon the delivery, *Rex v. Theed*, *ib.*

6. The standing forty days excommunicated need not be inserted in the writ, *Anonymous*, 71

7. But the special cause of excommunication must be inserted, so far as that it may appear to the Court to be of spiritual conusance, *Rex v. Theed*, 350, 351

8. *In quodam negotio* concerning the correction and reformation of manners, too general, *ib.*

9. *Pro causâ defamationis*, well, *Anonymous*, 71

10. The addition of "*chiothecario*," instead of "*chirothecario*," no good exception to the writ, *ib.*

11. A writ *de excommunicato capiendo* superseded before the return, *Rex v. Theed*, 353

12. Never superseded before the return until *now*, *ib.*

EXECUTION.

1. If judgment be general, execution must be so too, *Weddal v. Jocar*, 270

2. But if a judgment be for two distinct sums, *quære*, Whether the one may not be released, and execution taken out only for the other, *Weddal v. Jocar*, 307

3. Of fees for serving execution, *Mitchel v. Reynolds*, 85, 86

EXECUTOR.

1. If there be two executors, each of them has an interest in, and a power over the whole estate of the testator, *Baldwin v. Church*, 324

2. An executor may release, but he cannot bring an action before probate, *Nutton v. Crow*, 171

3. A woman executrix or adminiſtratrix, though a *feme-covert*, may ſue *ſole* in the ſpiritual court, *Daeth v. Baux*, 64

4. If one be ſued as executor, the action muſt be in the *detinet* only, *Miles v. Williams*, 163

5. Yet if the executor plead an ill plea, judgment ſhall be given *de bonis propriis* as to damages and coſts, *Baldwin v. Church*, 324

6. An executor, after entry upon the teſtator's term, is chargeable in the *debet et detinet* for rent or non-repair, *Buckley v. Pirk*, 12

7. But if he be charged as executor, though for non-repair in his own time, judgment ſhall be *de bonis teſtatoris*, *Johnſton v. Gardiner*, 255

8. He may not be ſued in one and the ſame action for debts due from the teſtator and himſelf, becauſe the judgment is different, *Nutton v. Crow*, 173

9. Neither may he join in the ſame action, debts owing to himſelf with thoſe due to the teſtator, *Nutton v. Crow*, 171, 172

10. Yet when an *indebitatus aſſumpſit* was brought by an executor upon three promiſes, two of which had been made to the teſtator, and the third to himſelf, after ſettling an account with the defendant of the dealings between him and the teſtator, the Court were of opinion theſe promiſes might be joined in one action; becauſe *here* the pleading, the judgment, and the effect of the judgment, muſt be *all* of them the ſame as they would have been in ſeparate actions, *Nutton v. Crow*, 171, &c.

11. But where one joined in the ſame actions, ſeveral promiſes to the teſtator, with a promiſſory note made to himſelf as executor, but payable to the plaintiff or order, the Court gave judgment, upon demurrer, for the defendant; for the plaintiff might either have brought his action upon this note without naming himſelf executor, or might have transferred it to any other perſon by indorſement, *Betts v. Mitchell*, 315, 316

12. In caſe of death before ſuch note is either received or transferred, it will go to the adminiſtrator of the executor, and not to the adminiſtrator *de bonis non*, &c. *Betts v. Mitchell*, 316

13. An executor may be ſued in his own name upon a promiſe to pay a debt of the teſtator's at a future time, *Johnſton v. Gardiner*, 254

14. And if he be named as executor, it will be only ſurpluſage, *Johnſton v. Gardiner*, 255

15. But without forbearance no advantage can be taken of ſuch promiſe, *Johnſton v. Gardiner*, *ibid.*

16. If debt be brought againſt an executor for a larger ſum than he has aſſets left ſufficient to diſcharge, yet if he has any aſſets at all, he cannot plead *this* in bar to the action, *Baldwin v. Church*, 324

17. Executors pay no coſts upon writs of error, though the judgment be *de bonis propriis*, *Holroi v. Ebixon*, 276, 277

18. If a creditor be made executor, he has a preference given him by law, *Cock v. Goodfellow*, 496

19. The law likewiſe allows him, among debts of equal degree, to give a preference to which he pleaſes, *Cock v. Goodfellow*, 495, 496

20. And at any time, by confeſſing a judgment, he has it in his power to give the preference to a ſimple-contract creditor, before creditors of a ſuperior nature, *Wilſon v. Fielding*, 428

21. And where payment is actually made to this judgment creditor, equity cannot relieve, *Wilſon v. Fielding*, *ib.*

22. Otherwiſe where the executor makes a fraudulent uſe of his power, equity will interpoſe, *Cock v. Goodfellow*, 496

23. But a court of equity will never take from the executor himſelf the preference the law gives him, *Cock v. Goodfellow*, *ibid.*

24. No difference between the words, "I make *A.* my executor," and "I "make *A.* executor of all my per-"ſonal eſtate," *Upnell v. Halſey*, 441

25. For

25. For the making a perſon executor does in law imply an abſolute gift of all the perſonal eſtate, if it be not reſtrained by the declared intention of the teſtator, *Upwell v. Halſey*, 441, 442

26. Therefore where there is no reſiduary legatee, by the common law the *reſiduum* of the teſtator's eſtate ſhall go to the executor, *Lord Lanſdowne's Caſe*, 99

27. But a contrary rule has obtained in equity, *ibid.*

28. Unleſs when it appears by collateral proof, that it was the intention of the teſtator the executor ſhould have the *reſiduum*, *ibid.*

29. An executrix, having a legacy left her, ſubmits in her anſwer to a bill brought for that purpoſe, that the ſurplus of the teſtator's eſtate ſhould be divided according to the ſtatute of Diſtributions; and decreed accordingly, *Mortimer Powell's Caſe*, 398, &c.

30. But at the ſame time the Lord Chancellor declared, he was not ſatisfied with the notion, that a legacy to an executor excludes him from the ſurplus; and therefore that without her ſubmiſſion he did not know whether he ſhould have decreed a diviſion or not, *Powell's Caſe*, 400

31. When this doctrine began to prevail in chancery, *Powell's Caſe*, *ibid.*

32. See alſo *Farrington v. Knightly*, 443

33. To what particular circumſtances the firſt decree of that ſort ſeems to have been owing, *Farrington v. Knightly*, *ib.*

34. In what caſe the contrary was afterwards decreed in the houſe of lords, upon parol evidence of the intention of the teſtator, 400. 442

35. And ſince *that* the *reſiduum* has been decreed to the executor by LORD COWPER, without the help of ſuch evidence, *Lord Lanſdowne's Caſe*, 400, 401

36. So that the law remains ſtill unſettled in this point, *Farrington v. Knightly*, 442

37. Where the executors had legacies given them, and the will ſeemed to be left unfiniſhed for want of the uſual concluſion, "In witneſs whereof I have "put my hand and ſeal;" the Lord Chancellor thought this a ſtrong circumſtance to induce a belief that the ſurplus was not deſigned for the executors, *Farrington v. Knightly*, 443

38. One was made executor upon a promiſe, that he would not thereby take any advantage with reſpect to any part of the eſtate, but let *A.* have it. Decreed the executor to be a truſtee for *A.* by virtue of this promiſe, *Parks v. Wilſon*, 516

39. A future intereſt in a term will go to the executor, *Marks v. Marks*, 421

40. He is *now* accountable for the intereſt of the teſtator's eſtate, as well as for the principal, though it was formerly otherwiſe, *Brown v. Litton*, 20

EXPOSITION OF WORDS AND SENTENCES.

Courts of juſtice ought to endeavour to expound in ſuch a manner as may be moſt proper to bring things to ſome end, *Cook v. Hamilton*, 369

"*Inde producit ſectam*," 253

"Unable to work," 308

"Excommunicated *ipſo facto*," 65, 79

"*Civiliter mortuus*," 360

"Commitment by warrant," 429

"Depart without convoy," 287

"To *J. S.* and his heirs," 371, &c.

"To ſuch daughters as ſhall be begot-"ten," 397, 398

"Then and thenceforth," 31. 73

"When *C.* and his wife ſhould die with-"out iſſue male," 314

"Dying without iſſue," 403

"You may if you pleaſe give 180l. to "my niece; but I leave it entirely to "you," 404, 405

"I do hereby revoke that part of my "will wherein I make *A. B.* and *C.* "three of my truſtees," 520

"*Tenere placita*," 125
"*Cognitio placitorum*," 126. 128
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"Imbezil," 150
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"Manor," 525
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F.

FALSE LATIN.

The penalty of a bond many times put into false Latin, and yet held good, *Lord Say and Sele's Case*, 47

FEE-FARM RENT.

A fee-farm rent extendible upon an *elegit*, *Atcherley v. Vernon*, 526

FEE-SIMPLE.

1. Where a fee-simple will pass without the word "heirs," 47. 523
2. In case of a failure of heirs, it will escheat to the lord of whom the land is held, *Thornby v. Fleetwood*, 411

FEOFFMENT.

1. A feoffment upon an unlawful condition shall be good, when a bond with the same condition would be void, *Mitchell v. Reynolds*, 134
2. The reason of this difference, *ibid.*

FINE.

1. Though a fine presupposes a writ of covenant, yet *now* the practice is to levy fines without, *Lord Say and Sele's Case*, 43
2. And though most fines are taken by *dedimus*, yet they are recorded as taken in court, to prevent questions about captions, *Lord Say and Sele's Case*, 45
3. A fine levied in Vacation-time, may be a fine either of the precedent or subsequent Term, at the election of the parties, *Lord Say and Sele's Case*, 44
4. If there be an intervening Term between the chirograph of the fine, and the time when the fine was actually levied, Whether this will vacate the fine, *Lord Say and Sele's Case*, 43, 44
5. A fine may not be vacated but by writ of error only, 43, &c.
6. Remainder-men not intitled to a writ of error to reverse a fine, 44

7. Fines that are void will make a diſcontinuance, *Reg. v. Buckingham*, 179. 245

8. A fine ſet aſide in chancery, becauſe levied to other uſes than what were intended by marriage articles, *Trevor v. Trevor*, 436, 437

FORMEDON.

1. A variance from THE REGISTER in a *formedon*, where the variance was immaterial, not regarded, *Skinner v. Newton*, 140

2. *Where* this writ will or will not lie, *Thornby v. Fleetwood*, 362. 367

FRAUD.

A recital in the will of the obligor, of a fraud made uſe of in extorting a bond, not to be allowed as evidence in equity to overthrow that bond, *Hancock v. Hancock*, 439

FREEHOLD.

Where a man may be amoved from his freehold in his abſence, *Reg. v. Simpſon*, 380

GAOLER.

One that is gaoler *de facto*, though not legally ſo, is bound to take care of the priſoners, *Kitſon v. Fagg*, 290

GAVELKIND.

1. Where lands are in the nature of gavelkind, all the ſons and their repreſentatives make but one heir, *Willis v. Lucas*, 417

2. All the lands in *Kent* muſt be preſumed to be gavelkind, *ib.*

GRANTS, GRANTOR, GRANTEE.

1. A grant of the profits of land will, even at law, carry the land with it, 94. 121. 287. 365. 401

2. In grants, the conſtruction of the words ſhall be governed by the intention of the parties, though it ſhould not ſuit exactly with the rules of grammar, *Jackſon v. Laverigbt*, 185

GUNNER (of a Ship).

A gunner, though a warrant officer, is liable to the ſame puniſhment in caſe of mutiny and deſertion, as other ſoldiers, *Johnſon v. Lowth*, 346

G.

GAMING.

1. Keeping a gaming-houſe indictable as a nuſance at common law, *Rex v. Dixon*, 336

2. Penalty by ſtatute 33. *Hen.* 8. *cap.* 49. forty ſhillings a day, *Rex v. Dixon*, 336, 337

GAOL.

1. County gaol, as to ſettlements, is conſidered as ſituate in every pariſh of the county, *Elſing v. Hereford*, 334

2. And conſequently a baſtard child born in the county gaol, is ſettled by birth in that pariſh where the parent was ſettled when ſent to gaol, *Elſing v. Hereford*, *ib.*

H.

HEIR, or HEIRS.

1. How the heir may be ſaid to be *eadem perſona cum anteceſſore*, *Marks v. Marks*, 421. 425

2. Where the words of a will are dubious, the heir at law to be favoured, *Atcherley v. Vernon*, 529

3. There muſt be expreſs words in a will, or a neceſſary implication, to diſinherit the heir at law, *Atcherley v. Vernon*, 525

4. If lands be deviſed to truſtees and no uſe declared, the law will imply it to be to the uſe of the heir, *Atcherley v. Vernon*, 520

5. If

5. If lands be given to *J. S.* and his right heirs, the words "right heirs" are words of limitation and not of purchaſe, *Woodright v. Wright*, 370

6. Law the ſame, though an entire eſtate ſhould intervene between the deviſe or the grant to *J. S.* and *that* to his right heirs, *Woodright v. Wright*, 372

7. As where an eſtate is limited to the anceſtor for term of life, remainder to *B.* in tail, remainder to the right heirs of the anceſtor, *Woodright v. Wright*, 373

8. The heir, and not executor, ſhall have the ſurplus of the teſtator's real eſtate deviſed to be ſold for the payment of debts and legacies, *Ratcliffe v. Roper*, 94

9. He may compel a conveyance of the truſt eſtate to himſelf, upon his own payment of the debts and legacies, 237. 240, 241

10. Or may determine what part of the land the truſtees ſhall ſell for the payment of them, *Roper v. Ratcliffe*, 237

11. The ſame, if the mortgagee ſells, 238

12. One that was knight of the garter, deviſed all his jewels to his wife; and yet reſolved, that his garter and collar of SS ſhould go to the heir, *Atcherley v. Vernon*, 530

13. Whether the manuſcript works of an anceſtor ſhall go to the heir at law, notwithſtanding a deviſe of the reſidue of the perſonal eſtate, *Atcherley v. Vernon*, 529, 530

14. If the tomb or monument of an anceſtor be defaced or deſtroyed, an action lies for the heir at law, *Atcherley v. Vernon*, 529

15. Where debt upon a ſpecialty is brought againſt an heir, he may plead "*riens per diſcent*;" and if it be found againſt him, the jury ſhall inquire of the value of the lands deſcended, by ſtatute 3. & 4. *W. & M.* c. 14. *Jeffery v. Barrow*, 18, 19

16. But he ſhall not have leave to plead "*riens per diſcent*" with any other plea, unleſs he make affidavit that he has "*riens per diſcent*," *Carrington v. Warren*, 334, 335

17. If one articles to buy land, and dies before conveyance, the heir may claim the land, and compel the executor to pay for it out of the perſonal eſtate, *Atcherley v. Vernon*, 528

18. If one articles to ſell land, and dies before conveyance, the purchaſe money ſhall be paid to the executor, and not to the heir, *Coventry v. Coventry*, 469

HIGHWAY.

1. If there be but one way to a vill, it ſhall be deemed a public way, though not deſigned for ſuch when it was laid out, *Reg. v. Hornſey*, 150

2. A highway infinite, having no *terminus à quo*, nor *terminus ad quem*, *Rex v. Hammond*, 383

3. A navigable river eſteemed a highway, *Rex v. Hammond*, 382

J.

JEOFAILS.

1. Want of an original is aided after verdict by ſtatute of Jeofails, *Dorſet v. Chaplin*, 318

2. But an ill original is not aided, 318, 319

3. Where the iſſue is material, but larger than needed, it is helped by ſtatute 32. *Hen.* 8. *Jeffery v. Barrow*, 19

IMPARLANCE.

A plea to the juriſdiction of the court, not to be received after an imparlance, *Caſe of Univerſity of Cambridge*, 127

IMPLICATION AND INTENDMENT.

1. Where it ſhall ſupply the want of an averment in a declaration, *Child v. Peirce*, 331

2. Of deviſes by implication, *ſee* DEVISE, 34, 35, 36

3. *Where* a ſtatute was held to be repealed by implication, *Reg. v. Simpſon*, 341

INDICTMENT.

1. The cauſing a man to be indicted for what a civil action might have been brought, implies malice, *Jones v. Gwyn*, 215

2. What is but evidence cannot be laid in the indictment, *Reg. v. Bradley*, 155

3. Same perſon cannot be both informer and witneſs, *Reg. v. Bradley*, *ib.*

4. Witneſſes produced for the crown in indictments, may be examined upon a *voir dire*, as well as in civil actions, *Reg. v. Muſcot*, 192, &c.

5. Whether uſing the trade of a badger without licence, be indictable? *Jones v. Gwyn*, 148

6. Indictment lies againſt the huſband and wife for keeping a bawdy-houſe, *Reg. v. Williams*, 63

7. Or a gaming-houſe, *Rex v. Dixon*, 335

8. That they, *et uterque eorum*, kept a gaming-houſe, well charged; for this is an offence of that nature as might well be committed by both jointly, *Rex v. Dixon*, 336

9. But where an indictment againſt four perſons for uſing the trade of a plumber, charged, that they four, *et uterque eorum*, &c. it was held naught; becauſe the offence not being the uſe of the trade, but the uſe of the trade without having ſerved an apprenticeſhip, this was an act impoſſible to be performed otherwiſe than by each ſingly, *Rex v. Dixon*, *ib.*

10. When the matter charged is an offence at the common law, the concluding *contra formam ſtatuti*, is no bar to the ſupporting the indictment by common law, if it be not maintainable by the ſtatute, *Rex v. Dixon*, 336, 337

11. Indictment for a nuſance ſhall not need to conclude *ad commune nocumentum*, where the nature of the offence imports that it is ſo, *Rex v. Dixon*, 337

12. Acquittal upon an inſufficient indictment will not intitle a man to the plea of *auterfoits* acquitted, to another indictment for the ſame offence, *Jones v. Gwyn*, 216

INFANT.

1. An infant is incapable of making any contract that is not for his advantage, *Mitchel v. Reyncldſ*, 139

2. Therefore all bonds entered into by infants, void, *Mitchel v. Reynolds*, 85. 139

3. But if an infant and a ſurety enter into a bond for neceſſaries for the infant, the bond is good as to the ſurety, *Mitchel v. Reynolds*, 139

4. And the infant may bind himſelf by promiſe to pay a reaſonable price for meat, &c. *Mitchel v. Reynolds*, 29. 85. 139

5. But not for wares, though neceſſary to the carrying on his trade, *Earl v. Peal*, 67

6. No action will lie for money lent an infant to buy neceſſaries, *ib.*

7. But for money laid out on that account an action will lie, *ib.*

INFORMATION.

1. An information will lie for not taking the office of a ſheriff, *Reg. v. Borough of Aldborough*, 101

2. And in ſuch caſe the not having taken the ſacrament within a year, &c. is no defence, *ib.*

3. In informations in the nature of *quo warranto's* againſt corporation officers, whether it be neceſſary for the defendants, in order to ſhew their title, to prove their qualification by having taken the ſacrament, &c.? *Reg. v. Whiteborn*, 65

4. In an information of *quo warranto*, if the defendant ſets forth his title with a traverſe *abſque hoc* that he uſurped the office, the traverſe is only matter of form,

form, and no material part of the plea that the crown can take iſſue upon, *Reg. v. Blagden*, 211, 212. 296, &c.

5. But in an information of intruſion, the crown may take iſſue upon the uſurpation, though a title be ſet forth, *Reg. v. Blagden*, 297

6. The reaſon of this difference, 297. 299

7. In informations upon the game acts, if it be laid generally, that not being qualified according to law, &c. it is well enough, *Reg. v. Mathews*, 27

8. But where the charge enumerates diſtinctly the ſeveral qualifications, omiſſion of one fatal, *Reg. v. Mathews*, 26, 27

INJUNCTION.

Motion in chancery for a perpetual injunction to ſtop all farther proceedings at law by ejectment, becauſe the party had already tried his right five ſeveral times, denied, *Earl Bath v. Sherwin*, 1, &c.

INNUENDO.

1. The office of *innuendo's* is only to explain what has been already mentioned, *Harriſon v. Thornborough*, 197, 198

2. And if they are made uſe of at any time to introduce new matter, they are void, *ib.*

3. As where an information ſet forth, that *H.* ſwore *J. S.* was, at ſuch a time, at *Newnham*, INNUENDO *Newnham in Devonſhire*. INNUENDO held void, *Rex v. Green*, cited, 197

4. So "burnt my barn," INNUENDO "full of corn," INNUENDO void, *ib.*

INQUIRY.

1. A writ of inquiry no ſummons, *Silk v. Hill*, 82

2. It is a judicial writ, *Shuttleworth v. Patterſon*, 270

3. By the common law, in every action of debt, damages are given *occaſione detentionis debiti*, either by writ of inquiry, or by the court, *Holroi v. Ehizſon*, 277

4. Motion to ſet aſide a writ of inquiry, for want of the words "*et habeas ibi* "*hoc breve*," denied, *Shuttleworth v. Patterſon*, 270

5. Where *writs of inquiry* have been held amendable, *Drummer's Caſe*, 68

INSURANCE.

1. Definition of an inſurance by the civil law, *Aſſieviedo v. Cambridge*, 77

2. If a ſhip inſured be taken by the enemy, and retaken before it is carried *infra præſidia* into ſome place of ſafety, the inſurer not liable, *Aſſievieds v. Cambridge*, 77, &c.

3. No difference in this reſpect between "intereſt or no intereſt" in the ſhip inſured, *Aſſievieds v. Cambridge*, 80

4. In policies of inſurance, warranted "to depart with convoy" has been reſolved to import, by the uſage of merchants, a *continuance* with that convoy as long as may be, *Jefferies v. Legendra*, cited, 287

INTEREST OF MONEY.

All intereſt of money reputed unlawful in the time of *Hen. 7. Reg. v. Buckingham*, 278

JOINT-TENANTS.

1. Chattels perſonal cannot remain in jointure after marriage, *Miles v. Williams*, 162

2. But *choſes in action* may, *ib.*

3. A rule among joint-tenants, that nothing accrues to the ſurvivor, but what was in jointure at the time of the death of his companion, *Miles v. Williams*, 163

4. A releaſe is the proper conveyance in law from one joint-tenant to another, *Anonymous*, 444

5. Yet if one *grants* all his eſtate to his companion, it ſhall be underſtood, by operation of law, to be a releaſe, *ib.*

6. But in ſuch caſe, if the party ſhould plead *quòd conceſſit*, it would be naught, *ib.*

JOINTURE.

1. A jointure made precedent to marriage, will bar a woman of her dower, *Blundel v. Barker*, 455

2. But if a jointure be made after marriage, the wife is at liberty, after her husband's death, to wave it, and to insist upon dower, *Mills v. Eden*, 488

3. The same law, if the jointure was not to take effect in the original creation of it, immediately upon the death of the husband, *ib.*

4. A woman is esteemed in law as a purchaser of her jointure for a valuable consideration, *Thornby v. Fleetwood*, 125

5. *See* also *Coventry v. Coventry*, 475

ISSUE.

1. The reason of joining issue is, that the parties may come prepared to defend one single point, *Reg. v. Blagden*, 299

2. What the law is, as to joining issue in the case of barratry, *ib.*

3. Issue may not be joined upon an immaterial part of a plea, *Reg. v. Blagden*, 211, 212. 297

4. Ought to be joined upon such a point as may be conclusive, which way soever it is found, *Weddall v. Jocar*, 304

5. What is immaterial in the issue, need not be proved, *Reg. v. Sutton*, 75

6. *Where*, by joining issue upon the issue tendered, the plaintiff must lose his debt, 147, 148. 267. 269. 304

7. Issue directed out of chancery to try the devise of an estate by implication, *Willis v. Lucas*, 418

ISSUE OF THE BODY.

1. The word "*issue*" of a larger signification than "*children*," *Woodright v. Wright*, 376

2. It is *nomen collectivum, ex vi termini*, and takes in the whole generation, *Backhouse v. Wells*, 183

3. Used in all acts of parliament, in as comprehensive a sense as "*heirs of the body*," *Woodright v. Wright*, 376

4. A man is said to "*die without issue*" in a legal sense, whenever his issue fails, though this should not happen till some ages after his death, *Target v. Grant*, 403

5. But when this legal sense would destroy the intention of a testator, the words "*dying without issue*" shall be understood in the vulgar acceptation, *viz.* "*of having no issue living at the time of his death*," *ib.*

6. "*Issue*" is ordinarily used in a will as a word of limitation, *Backhouse v. Wells*, 184

7. And most commonly in a deed as a word of purchase, *ib.*

8. *Where* it was used in a deed as a word of limitation, *ib.*

JUDGE, OR JUDGES.

1. Lord Chancellor not concluded by the opinion of the Judges, when sent for to assist at the hearing of a cause, *Gore v. Gore*, 502

2. But when a case is stated and referred to them for their opinion, their certificate binds, *Gore v. Gore*, 501, 502

3. If a point of law arises at a trial, the Judge is bound to direct the jury accordingly, whether the Counsel insist upon it or not, *Reg. v. Helstone*, 202

4. A rule made to shew cause why an attachment should not be granted against the Judge of an inferior court, for a contempt of the law of the land in disobeying a toll, *Burgh v. Blunt*, 349

JUDGMENT.

1. There are two sorts of judgments after verdict, *final* and *interlocutory*, *Silk v. Hill*, 83

2. If the plaintiff dies before judgment by delay of court, judgment may be entered without entering the continuances, *Lure v. Reft*, 30

3. *See* also *Taylor v. Mathews*, 325

4. But the time when in fact the judgment was given, must be marked on the roll, that purchasers of land may not

not be over-reached, *Taylor v. Mathews*, 325

5. *Where* the verdict may be for the plaintiff, and yet judgment muſt be for the defendant, *Menil v. Joſcelin*, 147

6. Whether judgment ſhall be reverſed for want of a *nil capiat per breve*, *Shipley v. Shipley*, 225

7. *Where*, upon writ of error brought, ſuch new judgment ſhall be given in *B. R.* as ought to have been given in the court below, *Baldwin v. Church*, 324

8. Of a writ of falſe judgment, *Burgh v. Blount*, 350

9. In informations and indictments, no judgment can be given in the ſuperior courts for any corporal puniſhment, without appearance (*per* EYRE), *Reg. v. Simpſon*, 250

10. But (after appearance) though a Court in prudence may not care to give judgment in the abſence of the party, yet no reaſon but that it may be done (*per* PARKER), *Reg. v. Simpſon*, 344

11. *Where* judgment was ſo given, *ib.*

12. In real actions upon a ſecond default, judgment ſhall be given againſt the defendant to loſe his land, *Reg. v. Simpſon*, 379

JURISDICTION.

It ſhall never be preſumed, that any court has exceeded its own juriſdiction, unleſs it is apparent that it has done ſo, *Anonymous*, 71

JURY AND JUROR.

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3. Of the power exerciſed by the court of aldermen over theſe returns, *Reg. v. Heathcote*, 54. 56. 59, &c.

4. A woman may bar herſelf by an agreement before marriage with a freeman of *London*, of her right to the cuſtomary ſhare of her huſband's eſtate, *Blundel v. Barber*, 455

5. But ſhe is not cut off from her cuſtomary right by a jointure in land, unleſs the jointure be made in bar, 457

6. If the wife of a freeman of *London* be barred by agreement before marriage of her cuſtomary part, the freeman may diſpoſe of a moiety of his perſonal eſtate by will, and the other moiety ſhall go to the children, *Blundel v. Barber*, 453, &c.

7. And ſo in like manner, where the children have been all of them fully advanced, the wife will be intitled by the cuſtom, to a moiety of the perſonal eſtate, and the other moiety will be the teſtamentary part of the freeman, *Blundel v. Barber*, 455

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10. A woman covenants with a freeman of *London* before marriage, to enter into bond to releaſe her cuſtomary third (and right of dower) to his executors within two months after his death, in caſe ſhe ſhould have ſuch an eſtate in land left her as was then agreed upon. The bond is given, the marriage takes effect, the huſband dies, and leaves his wife the land articled for. Decreed, the wife ſhould not be permitted to forfeit the penalty of the bond, but ſhould be held to her agreement; and that the huſband, as this caſe was *circumſtanced*, ſhould be conſidered as dying a purchaſer of his wife's cuſtomary part, *Blundel v. Barber*, 541, &c.

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14. If it appears under the father's hand what things were given a child, the advancement is ſufficiently certain, though the value of them be not expreſſed, 460

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16. A freeman of *London* having two daughters, advances one in his lifetime, and it appeared by the marriage ſettle-

ſettlement to which he was a party, that he gave her for portion 4000l. in money, beſides lands and the reverſionary intereſt of a leaſe of no certain *declared* value. In conſideration of which advancement, the daughter executes a releaſe to her father (who was then indebted to her ſome ſmall matter upon an unadjuſted account) of all the claims ſhe might have upon his eſtate, by the cuſtom of *London*, or otherwiſe, "*ſave what he ſhould pleaſe to give her* "*by his laſt will.*" Decreed, that this daughter ſhould not be barred by her advancement, or releaſe, from taking her cuſtomary ſhare which had been deviſed to her by her father's will, as reſiduary legatee, *Blundel v. Barber*, 452, &c.

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7. But a *mandamus* may be granted to the court of aldermen, if upon a falſe return of perſons not choſen by the wardmote, they refuſe to do juſtice to the parties injured, after complaint made, *Reg. v. Heathcote*, 59
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1. If a father enters into an agreement upon the marriage of his daughter, to ſettle ſuch an eſtate upon her, or to forfeit ſuch a penalty, and he afterwards chooſes to forfeit the penalty, it is a debt ſo entirely due to the huſband, that it is not in the power of chancery to take care of the wife and children, by decreeing a ſettlement of the penalty, *Q. Hobſon v. Trevor*, 511

2. If one covenants by marriage articles to make a ſettlement, and dies, the articles unperformed, Chancery will look upon things in the ſame light as if ſuch ſettlement had been actually made, as the court would have decreed upon the articles, if they had been applied to in the huſband's life-time, *Trevor v. Trevor*, 437

3. Fourteen hundred pounds is by marriage articles agreed to be laid out in land. Huſband dies, the agreement unperformed, and deviſes all his lands unto his nephews. LORD HARCOURT ſeemed to think, that ſince this money ought to have been laid out in land, it ſhould in equity be eſteemed land, and (notwithſtanding the wife oppoſed it, who was left executrix) ſhould paſs under this deviſe, ſubject in the firſt place to the uſes declared in the marriage articles, *Lingen v. Sowrey*, 39

4. A private agreement on marriage, derogatory and contradictory to *that* which is open and publick, ſhall be relieved againſt, *Turton v. Benſon*, 445

5. A father treating a match, obliges his ſon to enter into bond to pay him after marriage a ſum of money, which he ſaid was wanted to make proviſion for his other children. The bond relieved againſt, on a bill brought by the ſon and the wife's father, *Turton v. Benſon*, 448

6. A mother parts with her jointure to enable her ſon to make a ſettlement; but at the ſame time takes a private ſecurity from her ſon, to aſſign over to her after marriage a leaſehold eſtate of his own. The ſecurity ſet aſide in equity, *ib.*

7. *A.* agrees to ſettle on his kinſman upon marriage, ſuch an eſtate in poſſeſſion, and ſuch in reverſion; but obliges the kinſman to enter into a private agreement to redemiſe, &c. The private agreement ſet aſide in equity, and *A.* forced to account for the meſne profits of the eſtate that had been redemiſed, *Turton v. Benſon*, 448

8. *Where* it was laid down by *Lord Chancellor* COWPER, as a rule in equity, that if a ſon gives a bond during the marriage treaty, without his father's privity, to refund part of the portion, the bond is void, *Turton v. Benſon*, 447, 448

9. On a treaty of marriage between *A.* and the daughter of *B.* the mother of *A.* ſurrendered her jointure to enable her ſon to make a ſettlement (to which ſhe was one of the parties) proportionable to the fortune *B.* promiſed to give with his daughter. But at the ſame time *A.* enters into a bond to *B.* without the privity of his mother, to refund part of the wife's fortune at ſeven years end. *B.* dies in debt before the ſeven years are expired. Decreed againſt the creditors, that the bond ſhould be ſet aſide, *Turton v. Benſon*, 445, &c.

10. Covenant before marriage to releaſe the wife's guardian, within two days after, of all accounts of meſne profits; ſet aſide in equity, *Turton v. Benſon*, 447, 448

11. No difference between ſuch a contract and a marriage brocage bond, but only of more miſchievous conſequence, *ib.*

12. Of marriage brocage agreements, *Trevor v. Trevor*, 436, &c.

13. Articles of agreement for a jointure good againſt aſſignees of bankruptcy, *Cock v. Goodfellow*, 495

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1. Where by marriage articles a ſettlement is to be made, chancery will order one not according to the letter, but intent of the articles, *Trevor v. Trevor*, 437

2. As where by marriage articles lands are agreed to be ſettled in ſuch a manner, as that the huſband would be made tenant in tail, the Court will decree the huſband ſhall be made only tenant for life, that he may not have it in his power to bar the iſſue, and to defeat the intention of the ſettlement, *Trevor v. Trevor*, 436, 437

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3. And recovery in the one action may not be pleaded in bar of the other, *ib.*

4. The act of the ſervant where he has no authority from his maſter, will not bind him without his conſent, *Nickſon v. Brohan*, 119

5. If a ſervant has orders to ſell a horſe, and the ſervant ſells him as a good one, no action againſt the maſter, *Nickſon v. Brohan*, *ib.*

6. If a ſervant is ſent to receive money, and takes a bill in lieu of it, which is not anſwered, the maſter not bound, *ib.*

7. Otherwiſe, where a ſervant derives a credit from his maſter by being uſed to tranſact buſineſs for him, *ib.*

8. A ſervant uſed to tranſact affairs of that nature, is ſent with a note drawn upon a goldſmith to receive money, and inveſt it in exchequer bills; the ſervant gets *B.* to give him money for this note, and brings the exchequer bills to his maſter. Two days after the goldſmith fails. Adjudged, the maſter ſhould anſwer the money to *B.* *Nickſon v. Brohan*, 110, 111

9. And in this caſe it was held, the maſter could not recover of his ſervant, the loſs being occaſioned by accident, and not folly or negligence, *Nickſon v. Brohan*, 111

10. If a maſter uſes to ſend his ſervant to buy upon truſt, and the ſervant afterwards, when he is ſent with money, embezzles it, and continues to buy upon truſt, the maſter is chargeable, *ib.*

11. And though a ſervant be diſmiſſed, yet if notice be not given, and he is truſted upon account of the former credit he derived from his maſter, his maſter will be liable, *Nickſon v. Brohan*, 110

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25. Execution the end and life of the law, 290

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1. Promiſſory notes payable to ſuch a one, or order, are transferable by indorſement, by virtue of ſtatute 3. & 4. *Ann.* c. 9.

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2. Conditions againſt law, of how many kinds, *ib.*

3. But wherever the condition may be performed without breach of the law, the bond ſhall be eſteemed good, *ib.*

4. Of bonds conditioned for the reſtraint of trade, 27, &c. 85, 86. 130, &c.

5. If a bond be naught *quoad* the obligee, no aſſignment of his can make it good, *Turton v. Benſon*, 450

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7. If a bond be conditioned to do an act at the requeſt of the obligee, and the obligee dies without making any requeſt, the bond is extinguiſhed at law, *Atcherley v. Vernon*, 519, 520

8. The ſame where the obligor is made adminiſtrator (or executor) to the obligee, *ib.*

9. Dubious words in the condition of a bond, to be underſtood (ordinarily) in the moſt favourable ſenſe for the obligor, *Turner v. Goodwin*, 154. 223

10. Where the obligor was not permitted to forfeit the penalty of his bond, *Turton v. Benſon*, 451, &c. 507, &c.

11. Where a man was bound in an obligation, not ſaid to whom, and yet this was ſupplied by the intention, *Lord Say and Sele's Caſe*, 47

12. Bond taken by ſheriff for appearance *ad reſpondend' præfat'* J. S. *de placito tranſgr. ac etiam billæ* (omitting thoſe words in the writ *ipſius* J. S.), held good, *Rench v. Button*, 327, 328

13. Of ſheriffs bonds, ſee more under "SHERIFFS," 1. 4

14. *A.* upon marriage, enters into a bond to *B.* that if he died without iſſue by his marriage, he would leave 3000l. to one or more of the children of his elder brother, who had married *B.*'s daughter. *A.* dies without iſſue, and gave in his lifetime and by his will together more than 3000l. to one of thoſe children; but without any declaration that theſe gifts were deſigned in ſatisfaction of his bond, becauſe, as he ſaid (when adviſed to make ſuch a declaration), the bond had been unjuſtly extorted from him. In the will there was alſo a recital of the fraud made uſe of in obtaining the bond. DECREED the gifts ſhould be taken in ſatisfaction of the bond; ſince it ſufficiently appeared the obligor never intended to make thoſe gifts over and above the ſatisfying his bond, *Hancock v. Hancock*, 438, 439

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3. Generally the law is, that acts done by thoſe reputed in authority are good, *Kitſon v. Fagg.* 290

4. *Non uſer* of public offices that concern the adminiſtration of juſtice, a forfeiture of the office, *Reg. v. Pomfret*, 108

5. *Aliter* in private offices, without requeſt, and ſome ſpecial loſs occaſioned by ſuch *non uſer*, *ib.*

6. Deputation of an office grantable by parol, *Reg. v. Sutton*, 74

7. And therefore, though it ſhould happen to be granted by writing, yet it may be revoked by parol, *ib.*

8. Every one not only may, but is by law bound to give his aſſiſtance to officers in the execution of juſtice, *Templeman v. Caſe*, 25

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4. Order to pay money for the relief of a poor perſon until further order, good, *Rex v. Gully*, 308

5. Order upon the father of a baſtard to give ſecurity for indemnifying the pariſh for the future, good, *Rex v. Miles*, 271

6. Order to remove one with his children, too general, if the ages of the children be not expreſſed, *Reg. v. Petworth*, 26

7. If the children be not named, *Reg. v. Manchester*, 220

8. Order for removal, becauſe likely to become chargeable, is good without an adjudication, *Reg. v. Petworth*, 26

9. The pariſh on which an original order is made, cannot remove till it be reverſed, *Anonymous*, 84

10. And if in fact they do remove, and neglect their appeal to the quarter-ſeſſions, ſuch original order becomes final to all the world, *ib.*

11. *Similiter*, if affirmed upon appeal, *Reg. v. Petworth*, 25, 26

12. In orders relating to ſettlements, the Court muſt take the facts for granted as they are ſet forth, notwithſtanding there appear circumſtances ſufficient to induce the belief of a fraud, *Frencham v. Pepperharrow*, 293

13. Same point, *Horton v. Houghton*, 393

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1. Before the Reformation, the Book of Common Prayer was ſubject to the alteration of the ordinary, *Partridge's Caſe*, 105

2. And every biſhop appointed what feaſts ſhould be obſerved in his own dioceſe, *ib.*

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2. Not to abate by the demiſe of the crown, by ſtat. 1. *Ann.* c. 8. *Reg. v. Aires*, 258

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1. Conſpiring to levy war generally, is no overt-act to prove the compaſſing the death of the king, *Rex v. Darrell*, 322

2. *Aliter*, if the conſpiring to levy war be in order to dethrone him; for this is the civil death of the king, *Rex v. Darrell*, *ib.*

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1. In the caſe of outlawry for treaſon or felony, the law accounts the perſon outlawed guilty of the fact, *Reg. v. Simpſon*, 379, 380

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3. On error to reverſe outlawry for felony, a *ſcire facias* muſt iſſue, *Reg. v. Stafford*, 188

4. Otherwiſe, where the outlawry is for treaſon, *Reg. v. Stafford*, 188, 189

5. The reaſon of this difference, 188

6. Upon outlawry for leſſer crimes, or in perſonal actions, the party is put out of the protection of the law, *Reg. v. Simpſon*, 380

7. To be impriſoned, if found, *ib.*

8. Forfeits all his goods and chattels to the king, *ib.*

9. And likewiſe the iſſues and profits of his lands, as long as the outlawry remains in force, *Thornby v. Fleetwood*, 358, 359

10. See alſo *Reg. v. Simpſon*, 380

11. But alienation before inquiſition taken is a bar to the king, *Thornby v. Fleetwood*, 359, 409

12. Perſons beyond the ſeas may not be outlawed, unleſs in ſome particular caſe eſpecially provided for, *Thornby v. Fleetwood*, 357

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Where the court of chancery refuſed to allow of the receiving the ſacrament as a ſufficient proof of the converſion of a papiſt, *Cartwright v. Cartwright*, 512, &c.

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If an act for a general pardon be not pleaded nor given in evidence (where the defendant might have done either), Whether the Court can judicially take notice of it after a verdict? *Thornby v. Fleetwood*, 365

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1. Where a patent is to be ſet aſide, not upon account of a forfeiture, but becauſe it breaks in upon another's right, no office neceſſary, *Reg v. Aires*, 354, 355

2. A grant of the ſole uſe of a trade is (ordinarily) void, *Mitchel v. Reynolds*, 131

3. But where a trade is newly invented, the ſole uſe may be granted for fourteen years, *ib.*

4. Where a grant to make all playing-cards was adjudged to be monopoly, *Stationers' Co. v. Partridge*, 106

5. Whether a patent for the ſole printing of almanacks be good or not? 105, &c.

6. Where patents for primers, pſalters, pſalms, and almanacks, have been allowed, 107

7. Patent for ſole printing of law-books adjudged naught in *B. R.* for the uncertainty of what ſhould be eſteemed a law-book, *Partridge's Caſe*, 106

8. But this judgment was reverſed in the Houſe of Lords, *ib.*

9. So that this patent, having had the ſanction of the Houſe of Lords, is not now to be ſhaken, 107

PAYMENT AND SATISFACTION.

1. Acceptance in ſatisfaction not ſufficient, unleſs it be likewiſe pleaded to have been given in ſatisfaction, *Timber v. Gardner*, 224

2. In an action of the caſe upon ſeveral promiſes, the plea was, that the defendant gave the plaintiff a quantity of, &c. and the plaintiff accepted it in full ſatisfaction: queſtion, Whether the word "ſatisfaction" ſhould be underſtood to relate to the giving, as well as to the acceptance? *Timber v. Gardner*, *ib.*

3. If a different ſum be pleaded to have been paid in ſatisfaction of a bond, from *what* appears upon trial to have been received in ſatisfaction, this is a variation of the accord, *Weddal v. Jocar*, 306, 307

4. *Aliter*, where the difference is only in the time of the payment, 307

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1. The ſame evidence not ſufficient to convict of perjury, that may determine a caſe of property, *Reg. v. Muſcot*, 194

2. Unleſs the oath be not only falſe, but wilful and malicious, it is no perjury, *Reg. v. Muſtot*, 195

3. Therefore a man ſhall not be convicted of perjury for a miſtake, *Reg. v. Muſcot*, *ib.*

4. As when one ſwore he read ſuch a deed, and the fact was he read the counterpart only, this was ruled to be no perjury, *ib.*

5. Perjury may be committed in matters of circumſtance, where they are material, *ib.*

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Whether the ſame eſtate can be conſidered both as perſonal and real, in regard of different perſons, *Ratcliffe v. Roper*, 94

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1. No one may practiſe phyſic in *London*, or within ſeven miles of the town, without a licence from the college of phyſicians, *The College v. Weſt*, 353, 354

2. Nor may any, beſides graduates of one of the univerſities, practiſe in the country, without a licence from the preſident and three elects, *The College v. Weſt*, 354

3. The charter of incorporation, in which theſe privileges are granted, is confirmed by ſtatute 14. & 15. *Hen.* 8. 353

PLEAS AND PLEADINGS.

1. A plea to the juriſdiction of the court not to be received after an imparlance, *Caſe of Univerſity of Cambridge*, 127

2. Antiently, all pleas were *ore tenus* at the bar, *Ruſh v. Seymour*, 88

3. Pleading is ſetting forth properly and in due form that fact which in law is a good diſcharge, *Weddal v. Jocar*, 304

4. Such pleas as put circumſtances in iſſue, that do not touch the matter in queſtion, are naught, *Weddal v. Jocar*, 307, 308

5. Yet ſee where the defendant ſhall take advantage of his own immaterial pleading, *Merril v. Joſcelyn*, 148

6. Pleas are in their own nature entire, and cannot be good as to one part, and bad as to another, *Baldwin v. Church*, 323

7. *Ergo*, if a plea be pleaded to the whole, that goes but to part of the action, the plea is bad for the whole, *ib.*

8. Defendant may plead as many ſeveral matters to any action, with leave of the Court, as he ſhall judge neceſſary for his defence, *Haiton v. Jefferies*, 280

9. In pleading, words ſhall be tied to a ſtrict conſtruction according to the rules of grammar, *Jackſon v. Laveright*, 185

10. And every man's plea ſhall be taken ſtrongeſt againſt himſelf, *Muſton v. Yateman*, 229

11. Only it is a rule in pleading, that nothing needs be averred which appears ſufficiently plain without, *Child v. Pierce*, 331

12. See alſo *Horton v. Houghton*, 392

13. The greateſt certainty required in ſpecial pleading, *Reg. v. Blagden*, 299

14. Formerly, in actions of debt the whole agreement was uſed to be ſet forth, *Child v. Pierce*, 331

15. Though now of late a more conciſe way of pleading has obtained in actions upon the caſe, *ib.*

16. Neither was it allowable antiently to plead performance of covenants generally, *African Company v. Maſon*, 228

17. But in *Queen Elizabeth*'s time general pleadings began to be uſed to avoid prolixity, *ib.*

18. Of the difference between pleas of performance and pleas of excuſe, *Weddal v. Jocar*, 303, &c.

19. Whether it be neceſſary, that every thing that is pleaded by way of excuſe ſhould be proved, and make part of the iſſue? *Weddal v. Jocar*, 306, 307

20. Of the difference between pleading a cuſtom and a preſcription, *Reg. v. Gruelthorpe*, 158

21. The form of pleading a preſcription, *African Company v. Maſon*, 228, 229

22. Where *a ſeiſin in fee* was pleaded by the word "*ſeiſitus*" generally (omitting "*de feodo*"), and held well after verdict, *Muſton v. Yateman*, 228, &c. 300, &c.

23. "*Non uſurpavit*" no good plea to an information *quo warranto*, *Reg. v. Blagden*, 298, 299

24. Though uſurious bonds, and thoſe made to ſheriffs, or by infants, are all of them void, yet *non eſt factum* may not be pleaded, *Earl v. Peate*, 66. 179

25. Where debt is brought upon a bond conditioned for the performance of covenants in ſuch an indenture the defendant's plea will be naught, if it do not ſet forth the indenture, *Stone v. Tavener*, 329

26. Where money is to be paid in discharge of a debt, *tout temps prist* must be pleaded notwithstanding a tender, *Hammond v. Webb*, 282

27. *Contra*, where the action is brought on a bond given in defeasance of a former bond, *ib.*

28. Though there be several executors, yet the plea of any one of them shall bind the estate of the testator, *Baldwin v. Church*. 324

29. How the defendant should conclude his plea where there is neither writ nor bill, but the declaration is the first step in the cause, *Johnston v. Altham*, 211

30. The reason why most commonly the plaintiff concludes one way to the country, and the defendant another, *Weltale v. Glover*, 167

31. A special plea may not be set aside by a general replication, *Reg. v. Blagden*, 299

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A cause may be removed out of the county court into the court of *C. B.* by a *pone*, *Burg v. Blunt*, 349

POOR, POOR's RATES, POOR's SETTLEMENTS.

1. A poor's rate may not be made to reimburse an overseer of a former year, *Reg. v. Ware*, 104

2. Notice in writing left with the overseers of the poor, of coming to live in the parish, necessary to a settlement, by statute 1 *Jac.* 2. c. 17. *St. Mary v. St. Laurence*, 14

3. Payment of taxes and exercising of offices adjudged equivalent to such notice, upon the equity of the act, before the statute 3. & 4. *Will. & Mary*. *St. Mary v. St. Laurence*, *ib.*

4. A warden of a borough adjudged to be settled in the parish where he lived during the exercise of his office, though not chosen by the parish, *St. Mary v. St. Laurence*, 13, &c.

5. So exercising the office of a scavenger shall gain a settlement, *St. Mary v. St. Laurence*, 15

6. And yet the payment of a scavenger's rate, because a ward rate, was held to be no settlement within statute 3. & 4. *Will. & Mary*, 14

7. An apprentice is settled in the parish where he serves, though not bound there, *Rex v. Bury Pomroi*, 279

8. The same, whether his master be settled there or not, *ib.*

9. Unless the master be a certificate-man, *ib.*

10. In which case the servant can gain no settlement without his master do, *ib.*

11. Hiring for a year and service accordingly, makes a settlement, *St. Mary v. St. Laurence*, 15

12. But where service was three weeks short of the year, adjudged no settlement, *Pawlet v. Burnham*, 261

13. And *vice versâ*, where the hiring was for less than a year, though but for a few days less, yet it was held to be no settlement, notwithstanding actual service for a whole year, *Frencham v. Pepperharrow*, 293. 392

14. Service for a year and hiring for a year, though the whole year's service be not subsequent to that hiring, is a settlement, 287. 390. 392

15. Provided the service under such hiring be not less than forty days, *Brightwell v. Henley*, 287

16. Where a person was hired for eleven months, by the same master, from year to year, with only a week's distance between each hiring, the Court was divided, *Herton v. Houghton*, 392, 393

17. If a man takes one entire tenement of the value of 10l. *per ann.* though part of the tenement should lie in another parish, yet he is settled where the house is, *South Sidenham v. Lamerton*, 389

18. But if one takes several distinct tenements in several parishes, and each of them is under the value of 10l. *per ann.* though they amount to more in the whole, yet he gains no settlement any where, *South Sidenham v. Lamerton*, 390

19. If

19. If a perſon has a right of ſettlement in ſeveral pariſhes, it is at his election in which place he will ſettle himſelf, and the juſtices may not remove him from the place where he lives to any other, *South Sidenham v. Lamerton*, 388

20. Children are ſuppoſed to be ſettled in the ſame place with their father, except the contrary appears, *Newark v. Wirkſworth*, 272

21. A perſon ſettled in an extraparochial place cannot be ſent thither, if there be no officers to receive him, *Reg. v. Doughton*, 81

22. Neither can he be ſent to the pariſh where he was laſt ſettled, before he removed to ſuch extraparochial place, *ib.*

23. So that *this* being *caſus omiſſus*, the pariſh where he becomes chargeable ſeems without remedy, *ib.*

24. A certificate concludes the pariſh that gives it, as to all the world, *Honiton v. St. Mary Axe*, 9

25. A certificate-man adjudged to gain a ſettlement by the deſcent of a copyhold upon his wife, though of no greater value than 20s. *per ann. Rex v. Beaucleer*, 430, 431

POPERY.

Is a conſpiracy againſt the ſtate as well as religion, *Thornby v. Fleetwood*, 117

PORTIONS OR PROVISIONS FOR CHILDREN.

1. By a deed of ſettlement made after marriage, a ſum of money is lodged in truſtees for making a proviſion for ſuch daughters *as ſhall be begotten* of that marriage: Decreed thoſe words had relation to all the daughters begotten of that marriage as well before the ſettlement as afterwards, *Slingſby's Caſe*, 397, 398

2. By a marriage-ſettlement a term is created for making proviſion for younger children: in caſe of both ſons and daughters, 1000l. is to be paid to each of the daughters at twenty-one or marriage; in caſe of no ſon and but one daughter, ſhe is to have 5000l.; but in caſe of no ſon and more daughters, then 8000l. to go equally between them: and theſe ſums to be raiſed out of the rents and profits *as ſoon as they conveniently could*. The father dies without iſſue male, leaving three daughters. Decreed the 8000l. ſhould be raiſed by ſale, and that intereſt ſhould be allowed from the time of the father's death, *Aſhton's Caſe*, 401, 402

3. By marriage-ſettlement a power is lodged in truſtees to raiſe 3000l. for a daughter, payable at twenty-one or marriage, *when* C. *and his wife ſhould die without iſſue male*; *and in the mean time* 100l. *per ann.* to be paid her for her maintenance: Decreed the 3000l. not to be raiſed till after the death of both parents; but the 100l. *per ann.* for maintenance to be paid from the time of the daughter's marriage, or her attaining the age of twenty-one, *Champney v. Champney*, 314, 315

4. Land ſettled upon huſband and wife for their lives, and after the death of the longeſt liver, remainder to truſtees for the term of 500 years, for raiſing, after the commencement of the term, a ſum of 3000l. payable to daughters at twenty-one or marriage. Huſband dies, leaving only one daughter, who marries in the life-time of the mother. Decreed the 3000l. not to be raiſed during the life of the mother, by reaſon of thoſe words, "*after the commencement of the term*;" and yet ſuch a preſent right to be veſted in the daughter upon her marriage, as ſhould go to executors, &c. *Butler v. Duncomb*, 433, &c.

5. The ſelling of future terms during the life of both or either of the parents, not much approved of by *Lord Chancellor Parker*; and *what*, was it *res integra*, he ſhould not at any time willingly admit of, *Butler v. Duncomb*, 434

6. If in a marriage-ſettlement upon one child there are proviſions inſerted for other children, ſuch proviſions ſhall never be looked upon as fraudulent, and ſet aſide as ſuch in favour of creditors, *Oſgood v. Stroud*, 533

POSSESSION.

Poſſeſſion to be favoured, *Thornby v. Fleetwood*, 475

POSSIBILITY.

1. Deſcendible to the heir, *Marks v. Marks*, 421

2. If huſband and wife be tenants in ſpecial tail, and the huſband only levies a fine, the wife's eſtate-tail is turned into a poſſibility, *Thornby v. Fleetwood*, 412, 413

3. But if the wife ſurvives and enters after the death of her huſband, her entry (in caſe the remainder be to a ſtranger) will turn the eſtate of the conuſee into a poſſibility, *ib.*

POWERS, &c.

1. A man deviſes lands to his wife for life, and *then* to be diſpoſed of at her pleaſure to ſome one of his children; the wife conveys the land in tail by leaſe and releaſe and fine levied, and the power was adjudged to be well executed, *Thomlinſon v. Dighton*, 31. 72, 73

2. This power not ſuſpended by the wife's ſecond marriage, *Thomlinſon v. Dighton*, 31

3. Where one that was tenant for life, with a power of ſettling upon a wife, executed this power by leaſe and releaſe, it was held well *per* HOLT, *C. J.* *ib.*

4. Of the conſtruction of powers to charge eſtates, &c. *Coventry v. Coventry*, 466, &c.

5. Reaſons given why they ought to receive a large and favourable interpretation, *Coventry v. Coventry*, 446. 475

6. Where the intention of the party plainly appears, want of circumſtances in the execution of a power may be aided by equity, 467. 477

7. For circumſtances are annexed to powers only to prevent frauds, 468. 477

8. Where a power of charging lands for younger children in writing, atteſted by three witneſſes, was executed in a writing only atteſted by two, and yet decreed to be made good, 467

9. Where again a power of charging lands by deed or will under hand and ſeal, was executed by will without a ſeal, and yet made good, *ib.*

10. One having a power to limit a jointure of 1000l. *per ann.* covenants upon marriage to ſettle 1000l. *per ann.* The conveyance is made according to a particular of that ſuppoſed value, but what was afterwards found to be no more than 600l. *per ann.* Decreed the jointure ſhould be made up 1000l. by the remainder-man, *Clifford v. Clifford*, cited, 479

11. Tenant for life, with power of ſettling 500l. *per ann.* out of ſuch and ſuch lands covenants upon marriage, for himſelf and his heirs, &c. that he *or his heirs* would, in purſuance of this power, "*or otherwiſe*," ſettle 500l. *per ann.* After the marriage he directs a ſettlement to be drawn of ſuch lands as were comprized within the power, but dies before it is executed. Queſtion, Whether the remainder-man ſhould be bound by this intended conveyance, or whether the wife ſhould have ſatisfaction made her out of the perſonal eſtate? Decreed, upon a ſecond hearing, with the aſſiſtance of the Judges, that the lands ſhould be ſettled, *Coventry v. Coventry*, 463, &c.

12. Yet when one that had a power to make leaſes reſerving the antient rent, in the execution of the power reſerved the antient rent without ſaying what *that* was, the court of chancery refuſed to interpoſe to the prejudice of the remainder-man, *Coventry v. Coventry*, 473

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1. In what caſes precedents are of little or no authority, *Harriſon v. Thornborough*, 197. 269

2. Where a material variance from THE REGISTER was allowed by reaſon of precedents, *Skinner v. Newton*, 140

3. Precedents cannot be departed from without the greateſt danger to the eſtates and properties of the ſubject, *Woodright v. Wright*, 375

4. For

4. For to paſs a judgment contrary to precedents, is in effect to ſhake the law where it is firmly eſtabliſhed, 375

5. So that if the courſe of precedents be clear, their authority is too great to be controlled, though the reaſons appear to be naught upon which they were eſtabliſhed, *ib.*

PRESCRIPTION.

1. A preſcription that is naught at law, cannot be cured by verdict, *Muſton v. Yateman*, 300, 301

2. Otherwiſe, if it be only defectively ſet forth, 302

3. No leſs eſtate than a *ſeiſin in fee* will ſupport a preſcription, *Muſton v. Yateman*, 229, 300

4. Preſcription to common may not be pleaded generally *divers freeholders*, &c. but muſt be confined to ſome certain particular tenements, *Reg. v. Gruelthorpe*, 158

5. But by way of cuſtom, this general method of pleading will be good, *ib.*

6. Preſcription laid, that the defendant and all the occupiers, &c. too general, *Muſton v. Yateman*, 301

PRESENTATION.

1. Though the preſentation be without title, yet if inſtitution and induction follow, the party has ſuch a poſſeſſory right as he ſhall not loſe without a *quare impedit*, *Reg. v. Corporation of Buckingham*, 174

2. Otherwiſe, in caſe of a ſimoniacal preſentation, where all is made void by ſtatute, in the ſame manner as if the incumbent was naturally dead, *Reg. v. Corporation of Buckingham*, 176, 177

3. See alſo *Thornby v. Fleetwood*, 407

PRINTING.

1. Printing ſaid to have been more under the power of the crown, from the time it was firſt invented, than any other art whatever, *Company of Stationers v. Partridge*, 106

2. Becauſe an art introduced by the care of the crown, 106

3. And becauſe of the great inconvenience that may redound to the public by the miſmanagement of it, *ib.*

PROCTOR.

Whether a proctor may ſue for fees in the ſpiritual court? *Clerk v. Lee*, 262, &c.

PROHIBITION.

1. Though the wife be ſued ſingly in the ſpiritual court, yet both huſband and wife muſt be joined in praying a prohibition, *Savil v. Kirby*, 387

2. Where motion for a prohibition is founded upon matter of ſuggeſtion only, affidavit is neceſſary, *ib.*

3. Prohibition grantable *pro defectu triationis*, by reaſon of the different rules obſerved in the ſpiritual and common law, *Cottingham v. Lofts*, 272

4. See alſo *Dr. Bows v. Jurat*, 441

5. Lies to a ſuit for taking away the goods of an inteſtate from the adminiſtrator, becauſe an action of trover may be brought for them, *Sadler v. Daniel*, 21

6. Lies to a ſuit for fees in the court of admiralty, *Clerk v. Lee*, 264

7. Or in the court of honour, *ib.*

8. Whether it will lie to a ſuit for fees in the ſpiritual court, reſolutions both ways, *Clerk v. Lee*, 261

9. But *Lord Chief Juſtice* HOLT was of opinion, that a prohibition ought to be granted, becauſe otherwiſe the ſtatute of Limitations might be avoided, *Clerk v. Lee*, 263

10. A prohibition may be granted after ſentence, where it appears upon the face of the libel that the cauſe was not of ſpiritual cognizance, *Aſgil v. Hunt*, 439

11. *Aliter*, in matters that belong to the ſpiritual court, though for particular reaſons triable at the common law too, 13. 439, 440

12. Whether

12. Whether a prohibition will lie after ſentence, in a ſuit for *Eaſter offerings*, where no defence was made, *Dr. Bows v. Jurat*, 440, 441

13. Where the ſpiritual court tried a preſcription to a right of chooſing churchwardens, a prohibition was denied after ſentence, *Baniſter v. Hopton*, 12

14. Will not lie after ſentence for calling a woman "*whore*," though the words were ſpoken in a place where they are puniſhable by a particular cuſtom, *Aſgil v. Hunt*, 439

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16. Will not lie to ſtop a *feme-covert*'s ſuing ſingly upon the ſtatute of Diſtributions, *Death v. Beaux*, 64

17. If the wife be ſued ſingly in the ſpiritual court where the huſband ought to have been joined, this is no cauſe for a prohibition, though it may be a good one for an appeal, *Clerk v. Lee*, 264

18. In a ſuit in the ſpiritual court for a church-rate, where the pariſhioners were taxed ten times the value of an antient rate without ſaying *what*, a prohibition was moved for upon account of the uncertainty of the rate, but denied, *Forte v. Buviere*, 13

19. Motion for a prohibition upon a diſpute between a peculiar and the prerogative court, whether *bona notabilia* or not; refuſed to be granted, *Cottingham v. Lofts*, 272

20. Where the principal belongs to the ſpiritual court, the acceſſory ſhall be tried there too, *Savil v. Kirby*, 386

PROPERTY.

1. When the property of goods taken by an enemy is altered, and when not, *Aſſievedo v. Cambridge*, 78, &c.

2. By the laws of *France* and *Spain*, a continuance in the poſſeſſion of the enemy for twenty-four hours is an alteration of the property, *Aſſievedo v. Cambridge*, 78

3. The ſame by the old *Engliſh law*, according to *Albericus Gentilis*, 78

4. But *now* neither our law nor the *jus gentium* allow the poſſeſſion of the enemy to introduce any alteration of property before ſuch time as they are carried *infra præſidia*, *Aſſievedo v. Cambridge*, 79, 80

5. Ship taken by the *French* in 1691, off *Yarmouth*, carried to *Northbergen*, then ſold to *A.* and afterwards to *B. B*, ſends her to the *Weſt-Indies*, afterwards to *France*, and in 1695 to *England*; where ſhe being retaken, it was reſolved by the court of the admiralty, that the property had not been altered, *Eaſt India Company v. Sands*, cited, 79

6. Where acceptance is not neceſſary to an alteration of property, 189, 190. 432

PURCHASE AND PURCHASER.

1. Legal import of the word "*purchaſe*," 92. 483

2. Where and how far perſons diſabled at the common law from taking by deſcent, have yet a capacity left in them of taking by purchaſe, *Thornby v. Fleetwood*, 359, 360

3. Difference between taking by limitation and taking by purchaſe, *Woodright v. Wright*, 377

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QUARE IMPEDIT.

1. The old writ of *quare impedit* is now out of uſe, and what is at preſent called by that name is the writ of *quòd permittat*, *Rex v. Biſhop of Meath*, 311

2. In a *quare impedit* plaintiff and defendant are actors one againſt another, if they be both out of poſſeſſion, *Rex v. Biſhop of Meath*, 309

3. But if the defendant be in poſſeſſion, he is not obliged to make a title, or become actor, *ib.*

4. How the vacancy ought to be pleaded, 310, 311

5. Where it is ill, exception comes too late after the vacancy had been admitted by pleading a preſentment under it, *Rex v. Biſhop of Meath*, 311

6. See a miſtake in pleading the ſeiſin, 310

7. Where in a *quare impedit* by the chancellor and univerſity, the conviction of a popiſh recuſant was held to be ſufficiently pleaded without the words *ideo convictus eſt*, *The Univerſity of Cambridge v. Archbiſhop of York*, 209

8. In a *quare impedit* the *venire* muſt be returnable upon one of the common return days, *Rex v. Biſhop of Meath*, 310

9. The omiſſion *inde producit ſectam*, may excuſe the defendant from anſwering, *Rex v. Biſhop of Meath*. 310, 311

10. But it is not aſſignable for error after he has anſwered, 311

11. A writ of error upon a *quare impedit*, pending a year, the value of the living for a year was given in damages, *Holroi v. Ebizon*, 274

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What conſtitutes the proper difference between real and perſonal eſtates, *Roper v. Ratcliffe*, 237

RECOGNIZANCE.

1. Releaſe of a recognizance *ante emanationem ſcire facias*, an immaterial plea, *Rogers v. Wood*, 87

2. A recognizance "*ad reſpondend.*" *generally*, extends not only to the crime for which the party was committed, but to all ſuch crimes as he ſhall be charged with, *Reg. v. Ridpath*, 152, 153

3. If the party do not appear, be the cauſe of his abſence what it will, the recognizance is forfeited, *Reg. v. Ridpath*, 153

4. Judges of *oyer* and *terminer*, the proper judges whether recognizances ought to be eſtreated or ſpared, *Rex v. Tomb*, 278

5. Though a recognizance for appearance has been eſtreated, yet if the party appears, and takes his trial next ſeſſions after, it may be compounded in THE COURT OF EXCHEQUER for a very ſmall matter, *ib.*

RELEASE.

1. A releaſe of "all demands" given by the huſband, will releaſe a debt owing to the wife before coverture, for the huſband only can demand it, cited in *Miles v. Williams*, 165

2. *Aliter*, if he gave a releaſe of all actions, *ib.*

3. A man may releaſe a right which he cannot aſſign, *Marks v. Marks*, 423, 425

RELIEF IN EQUITY.

1. If ſuch and ſuch particular lands are agreed by marriage articles to be ſettled upon the heirs of the marriage, and are afterwards (no ſettlement being made) conveyed to different uſes, the deſcent of other lands of greater value than thoſe compriſed in the articles, ſhall not bar the heir from being relieved againſt this conveyance, *Trevor v. Trevor*, 436, &c.

2. If the articles had been only to ſettle lands generally, *quære*, 438

3. If an executor applies part of the perſonal eſtate to pay off a mortgage debt, and by that means the aſſets prove inſufficient to diſcharge the debts owing by ſimple contract, the creditors ſhall be relieved againſt the heir, *Wilſon v. Fielding*, 456

4. A note is given to a maid-ſervant for a ſum of money, in conſideration of her endeavours to procure a marriage. The maid marries one who had no notice of the conſideration of the note, but was induced to have her upon the account of this money; and yet the

note was relieved againſt, *Turton v. Benſon*, 448

5. Relief not to be had, where it cannot be given without overruling the maxims of the common law, *Earl of Bath v. Sherwin*, 1

REMAINDER.

1. It is a principle of law, that a remainder muſt veſt at the determination of the particular eſtate, or ſooner, *Thornby v. Fleetwood*, 362

2. And therefore, before a late act of parliament, it was cuſtomary to veſt the eſtate in truſtees for the preſervation of contingent remainders, *ib.*

RENT.

1. A rent created *de novo* (but not a rent *in eſſe*), may be granted with a condition to ceaſe during the minority of the heir, *Thornby v. Fleetwood*, 366

2. And in caſe of ſuch a grant, the wife of the grantee ſhall recover in a writ of dower with a *ceſſet executio* during the minority of the heir, *Thornby v. Fleetwood*, 367

3. An action of debt is brought for 15l. rent. The declaration is upon two demiſes for 22l. Held ill, and not to be helped by a *remittitur*, *Stafford v. Beaath*, 69, 70

REPLEVIN.

A poſſeſſory right only, without the property, not ſufficient to maintain a replevin, *Templeman v. Caſe*, 25

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1. If a vicious replication be made to an inſufficient bar, Whether the plaintiff may have judgment, *Aubry v. Fortefcue*, 206

2. In debt upon bond, plaintiff ſhall not vary the day in his replication from *that* alledged in narr. But otherwiſe in trefpaſs, *Cole v. Hawkins*, 252

3. It is not neceſſary to ſet forth in a replication what is admitted by the defendant's plea, *Vincent v. Atwood*, 257

4. A replication that puts in iſſue only the immaterial part of the defendant's plea is naught, *Reg. v. Blagden*, 211, 212. 297

5. Though the defendant's plea appear to be falſe of his own ſhewing, yet if ſuch matter be pleaded in the replication as ſuppoſes and admits it for true, the plaintiff is not at liberty to take exception to it afterwards upon a demurrer to the rejoinder, *Potter v. Pinkney*, 265

RETURN OF WRITS.

1. The returning of a writ is a miniſterial and not a judicial act, *Rex v. Biſhop of Meath*, 309

2. No officer but a ſheriff, and *that* by the *ſtatute of York*, obliged to ſet his name to the return of a writ, *Rex v. Biſhop of Meath*, 308

3. If the return be not queſtioned within the firſt Term after it comes into court, it ſhall be taken for granted that it was made by a proper officer, *ib.*

4. If writs iſſue out of another court returnable in *B. R.* the court may compel the proper officer to make the return, *Clark v. Elwick*, 333

5. Between the *teſte* and the return of all ſummons and attachments, fifteen days neceſſary by common law, as well as by ſtatute, *Silk v. Hill*, 82

6. If no return be made to a writ of error, there goes an *alias*, then a *pluries*, and then an attachment againſt the Chief Juſtice, *Nutton v. Crow*, 284

7. Return of a writ of error out of *Ireland* by RICHARD Cox *Mil*r (omitting "*Capital' Juſtic' infranominat'*,") and held well by reaſon of precedents, *Rex v. Meath*, 308. 311

8. *Where* the returns to writs of error have been only *record' et proceſſ. de quibus, &c. ſequuntur in hæc verba*, without any *reſponſ'* at all, *Rex v. Meath*, 308

9. In caſe of the removal of orders or convictions by *certiorari*, entire credit muſt be given to the returns made by the juſtices, 293. 382. 393

10. But

10. But if the juſtices make a falſe return, whereby juſtice and the parties are abuſed, they may be puniſhed, *Reg. v. Simpſon*, 382

REVOCATION.

1. If uſes be revocable by writing under the proper hand and ſeal of *A.* the revocation is a perſonal act, *Duke of Norfolk's Caſe*, cited, 291

2. If a power of revocation by writing have a clauſe, "that *then and thence-forth* the uſes ſhall be revoked," yet the revocation may be by will, though *that* takes no effect till death, *Thomlinſon v. Dighton*, 73

3. Caſes relating to powers of revocation not much favoured, *Coventry v. Coventry*, 478

4. One makes a voluntary ſettlement, with power of revocation on tender of a guinea, and afterwards makes another voluntary ſettlement of the ſame lands to different uſes, the tender of the guinea not being proved, the court of chancery refuſed to ſet aſide the firſt ſettlement, *Coventry v. Coventry*, 476

5. A woman makes a ſettlement in favour of her huſband, with a power of revocation, and afterwards ſends letters of inſtructions to have a deed prepared in purſuance of this power, for revoking the ſettlement, but dies before the deed is executed. The ſettlement not revoked, *Coventry v. Coventry*, 473

6. But had the wife been hindered from executing her power by any act of the huſband, *this* would have been a ſufficient ground for relief in equity, *ib.*

7. Want of formalities, and circumſtances in the caſe of a revocation (when omitted through neceſſity), may be ſupplied by equity, *Coventry v. Coventry*, 468

RIGHTS AND REMEDIES.

1. In what caſe there ſeems to be no remedy, *Reg. v. Doughton*, 81

2. In ſome caſes the law gives a double remedy for the ſame right, *Reg. v. Heathcote*, 59

3. If the covenants be mutual, the remedies ought to be ſo too, *Lewis v. Lechmere*, 505

RULES OF COURT.

1. If a cauſe has not been at all proſecuted during four Terms, proceſs cannot be revived without a Term's notice, *Harvey v. Wright*, 40

2. And note, a *Term's notice* is ſo to be underſtood, that a whole Term muſt intervene between notice and trial, *ib.*

3. When and where a copy of a rule of court ſhall be allowed as evidence, *Stennil v. Brown*, 109

4. The method of making a ſubmiſſion to an arbitration a rule of court, *Clarke v. Elwick*, 332

RULES OF LAW AND EQUITY.

1. Rules of law the boundaries and fences of property, *Coventry v. Coventry*, 476

2. Every one is preſumed to know the law, *ib.*

3. No limiting *a fee upon a fee* by the common law, *Marks v. Marks*, 422, 423

4. A freehold can never be in ſuſpence or abeyance, ſave in caſes of abſolute neceſſity, *Thornby v. Fleetwood*, 361. 364

5. *In dubio hæc legis conſtructio quam verba oſtendunt*, a rule both at civil and common law, *Thornby v. Fleetwood*, 117. 410

6. Things that ought to be done, are in equity conſidered in the ſame light as if they were done, *Roper v. Ratcliffe*, 240. 526

7. It is a rule in equity, that he who has law and equity both on his ſide, ſhall be preferred to one who has an equitable right only, *Cock v. Goodfellow*, 494

S.

SCIRE FACIAS.

1. One may plead in bar or abatement to a *ſcire facias*, as well as to other actions, *Alice v. Gale*, 112
2. To a *ſcire facias* the plea in bar is concluded with an *executio non*, as in other caſes by an *actio non*, *ib.*
3. Where a *ſcire facias* is a judicial writ, it will not abate for want of form, *Shuttleworth v. Patterſon*, 270, 271
4. "*Si ſibi viderit expedire*" omitted in a *ſcire facias*, and yet held good, *ib.*
5. A *ſcire facias* on recognizance of bail is a judicial writ, *Weddal v. Jocar*, 306
6. Not neceſſary to ſet forth in a *ſcire facias* againſt bail, the awarding of a *capias* againſt the principal, *Vincent v. Atwood*, 257
7. Motion in arreſt of judgment upon divers exceptions to a *ſcire facias* brought for the repeal of a patent for fairs, 258, &c. 354, 355
8. In caſe a patent is prejudicial to the ſubject, a *ſcire facias* held to be a writ of right, *Vincent v. Atwood*, 260. 354
9. At what diſtances both of time and place, the holding of fairs and markets may be granted without prejudice to each other, the jury the proper judges, *Vincent v. Atwood*, 355
10. Where a *ſcire facias* is an original writ (as *here* it is), it will not abate upon the demiſe of the crown, *Vincent v. Atwood*, 258, 259. 355

SHERIFF.

1. In what caſe a bond taken by the ſheriff to indemnify him in the execution of a writ has been held good, *Reg. v. Heathcote*, 53
2. By the common law he is to take no fees for doing his office, *Mitchel v. Reynolds*, 139
3. But *now* he has fees given him by ſtatute, *ib.*
4. Yet bonds taken for execution fees are void; and why, 85, 86. 139
5. Promiſe for the payment of them, good, *Mitchel v. Reynolds*, 85
6. In an information againſt *D.* for exerciſing the office of alderman of *London*, not being duly choſen, challenge to the array by the crown, becauſe one of the ſheriffs was one of the perſons returned to the court of aldermen, allowed, *Reg. v. Delme*, 198, 199
7. And the queſtion to be tried being, Whether the right of election lay in the freemen of the ward only, or in all that paid ſcot and lot; it was afterwards allowed for good cauſe of challenge to the array, becauſe returned by a ſheriff that was concerned in intereſt as a freeman of the city, *Reg. v. Delme*, 199

SOLDIER.

1. A ſoldier is privileged from being held to ſpecial bail by act of parliament, 4. 111
2. This privilege extends to *troopers*, and to the *gunners* of the king's ſhips though warrant officers, *Johnſton v. Lowth*, 346, 347
3. Among ſoldiers, poſſeſſion of goods for a *certain time*, after taking from the enemy, alters the property, *Aſſievedo v. Cambridge*, 79
4. What the laws determine in this point, ſee "PROPERTY."

SPECIFICK PERFORMANCE.

1. A ſheriff that refuſes to aſſign a bail-bond, is not only liable to an action at law, but may be compelled in chancery to a ſpecifick performance, *Kitton v. Fagg*, 289
2. In caſe of a contract for lands, a bill lies in equity againſt the vendor for ſpecifick performance, *Atcherley v. Vernon*, 527
3. And ſhould the vendor ſell and convey the land afterwards to another, having notice of the precedent contract, the ſecond vendee may in ſuch caſe be compelled to a ſpecifick performance,

formance, *Atcherley v. Vernon*, 527, 528

4. The vendor may bring his bill for a ſpecifick performance, as well as the vendee, *Lewis v. Lechmere*, 505

5. Whether it be conſiſtent with the rules of equity to decree a performance in *ſpecie* of a purchaſe of lands at a very extravagant and unreaſonable price, *Lewis v. Lechmere*, 503, &c.

6. *Where* it was determined in the court of exchequer to inforce a ſpecifick performance of ſuch contracts, if the price was reaſonable at the time of the contract, how diſproportionable ſoever after accidents might make it, *Lewis v. Lechmere*, 504

7. Bill brought by the vendor for a ſpecifick performance of articles for the purchaſe of an eſtate at 40 years purchaſe, diſmiſſed with coſts, becauſe the title was not laid before the vendee's Counſel within the time limited, *Lewis v. Lechmere*, 503, &c.

8. Where the vendor had covenanted to convey freehold, and one acre or two proved copyhold, the court refuſed to decree a ſpecifick performance of an extravagant bargain, notwithſtanding the vendor offered to procure an enfranchiſement of the copyhold, or to make any compenſation in the price, *Lewis v. Lechmere*, 504

9. By marriage articles land is agreed to be ſettled in ſpecial tail, remainder to a fourth ſon of the huſband's father. The eſtate-tail being ſpent, and no ſettlement made, a bill is brought by the heir of the remainder-man againſt the heir of the huſband, for a ſpecifick performance of the articles. And it appearing in the cauſe, that the huſband's father had a power of charging the eſtate with the payment of 1300l. which it was not probable he would have departed from, but in conſideration of his ſon's giving his conſent to that part of the ſettlement under which the plaintiff claimed, a conveyance was decreed accordingly, *Oſgood v. Stroud*, 533

10. *A.* enters into a treaty of marriage for his daughter with *B.* and gives him a bond to ſettle, &c. one third of whatever lands ſhould come to him by the death of his father. The obligor not permitted to forfeit the penalty of his bond; but the bond taken as evidence of an agreement to ſettle, &c. and a ſpecifick performance decreed, *Hobſon v. Trevor*, 507, &c.

11. *A.* ſeiſed of a copyhold eſtate attempts to ſurrender it to the uſe of his will, with a reſolution to deviſe it to *B.* his ſiſter's ſon; but a ſurrender not being practicable by reaſon of ſome accidents, he prevails with his ſiſter, who was heir at law, to give a bond to her ſon, conditioned to ſurrender at his requeſt, upon the payment of 200l. *A.* dies, *B.* receives the rents and profits ſome time, and then dies inteſtate, leaving only two ſiſters. The mother adminiſters, and having procured herſelf to be admitted tenant of the copyhold, &c. deviſes it by will to one of her daughters and ſiſter of *B.* The other brings her bill againſt the deviſee for a ſpecifick performance of the condition of the bond, by which ſhe would be entitled to a moiety of the land. Decreed, that the mother ſhould be conſidered as a truſtee for *B.* and that a ſurrender and conveyance ſhould be made accordingly upon the payment of the 200l. with intereſt from the death of *A. Parks v. Wilſon*, 515, &c.

STATUTES IN GENERAL.

1. It is the proper buſineſs of acts of parliament to make alterations in the common law, *Thornby v. Fleetwood*, 411

2. The Judges have authority to mould ſtatute laws according to reaſon and beſt convenience, to the trueſt and beſt uſe, *Thornby v. Fleetwood*, 412

3. Statutes ought not to be ſo expounded as to elude the force of them, *Reg. v. Simpſon*, 344

4. The intention of the act ſhould be ſupported, *Roper v. Ratcliffe*, 239

5. And where the words are doubtful, that expoſition ought to prevail, which will

will render the act the most effectual, *Reg. v. Simpson*, 343. 346

6. Care must be taken to put such a construction upon the whole as may make the parts consistent with each other, *Roper v. Ratcliffe*, 239. 483

7. The words of an act of parliament are to be understood in a legal sense, unless the subject matter of the act does apparently hinder it, *Roper v. Ratcliffe*, 234

8. The best way of interpreting statutes, is by the rules of common law in like cases, as far as is consistent with preserving the end and design of the act, 245. 345. 359. 360. 379. 395. 411

9. Statutes against natural equity are void, *Thornby v. Fleetwood*, 115

10. Statutes made for the advancement of religion, must receive as strong an interpretation for the attainment of that end as possible, 117. 356. 410

11. Penal statutes commonly receive the most mild and favourable interpretation, *Ratcliffe v. Roper*, 93

12. Yet penal statutes that are remedial laws, or designed for the advancement of the public good, may be extended by equity, 95. 117. 242. 281, 282. 356. 410

13. Savings or exceptions in statutes, must not be so expounded as quite to overthrow the purview, *Thornby v. Fleetwood*, 115. 408

14. A general subsequent clause may be restrained by a preceding one, *Roper v. Ratcliffe*, 242. 485

15. Whatever is a necessary and unavoidable consequence of an act of parliament, is to be esteemed a part of the act, as much as if it was inserted *totidem verbis*, *Thornby v. Fleetwood*, 410, 411

16. Upon the repeal of a statute that repealed a former statute, the first statute is revived again, *Thornby v. Fleetwood*, 412

17. Repeals by implication not to be allowed of, where it is possible to make statutes consistent, *Thornby v. Fleetwood*, 118

18. And where it is not, the latter statute should be so interpreted as to repeal as little as possible of a precedent one, 118

19. Where a statute gives a penalty, and does not say to whom, *there* (commonly) the crown shall have it, 121. 358. 364. 409

20. Yet where a penalty is given by way of damage, *there* (though not said to whom) the penalty shall follow the loss, *Thornby v. Fleetwood*, 121

21. In penal laws, computation of time is generally taken inclusively, *Reg. v. Green*, 212

22. Where the statute makes the offence, no other remedy can be pursued but what the statute gives; otherwise of a crime indictable before, *Rex v. Dixon and his Wife*, 337

23. In summary proceedings upon statutes, Whether it be necessary to observe the rules of common law, or only those of natural justice, *Reg. v. Simpson*, 341, *&c.*

24. When matters of record, or specialties entered into with ceremony are made void by statute, the meaning (commonly) is no more than that they may be *avoided* in a proper manner; for acts of parliament do always suppose necessary incidents, *Reg. v. Corporation of Buckingham*, 180

25. Otherwise, when the act relates to a matter *in pais*, *ib.*

STATUTES PARTICULAR EXPLAINED.

I. The statute 9. Hen. 3.

Magna Charta.

1. *Mandamus's* founded upon Magna Charta, *cap.* 29. *Reg. v. Heathcote*, 53

2. Liberty of the subject precarious before this statute, *Partridge's Case*, 106

3. Monopolies said to be contrary to Magna Charta, *Mitchel v. Reynolds*, 133

4. This statute does not annul the monopolies that were then in being, but pro-

provides againſt new ones, *Partridge's Caſe*, 106

II. THE STATUTE of *Marlbridge*, c. 23. 52. Hen. 3.

1. Prohibits farmers to make waſte, *Hammond v. Webb*, 282
2. Expounded by equity, though a penal law, *ib.*
3. *Farmers* extends to ſtrangers, *ib.*
4. "*Making waſte*" means to waſte by neglect, *ib.*

III. THE STATUTE of *Gloucester*, 7. Ed. 1.

De Religioſis.

1. Diſables the church from taking lands by any manner of conveyance, *Roper v. Ratcliffe*, 236
2. Yet if the church brought their action for ſuch lands as they deſired to purchaſe, and judgment was ſuffered to go by default, *this* was held to be out of the ſtatute, *ib.*

IV. THE STATUTE *Weſtm.* 2. c. 1. 13. Ed. 1.

De Donis.

1. Deſigned to ſecure the eſtate of the anceſtor to the iſſue, 375. 469. 476. 478
2. Declares a fine levied of intailed lands to be *ipſo jure null*, 43. 179. 245
3. Yet it has been interpreted to mean *voidable* only, *Lord Say and Sele's Caſe*, 43
4. So that ſuch a fine would make a diſcontinuance, *Reg. v. Buckingham*, 179. 245
5. *Where* this ſtatute has been expounded in ſeveral inſtances by the rules of common law, *Thornby v. Fleetwood*, 360
6. It is now much altered by ſubſequent ſtatutes, and judgments that have been given in the courts of law, *Woodright v. Wright*, 375

V. THE STATUTE 13. Edw. 1. c. 18.

Execution.

1. The ſheriff to extend a moiety of the debtor's land upon an *elegit*, *Atcherley v. Vernon*, 526
2. A fee-farm rent may be extended, *ib.*

VI. THE STATUTE 13. Edw. 1. c. 46.

Approvements.

1. Where fences made upon juſt approvement are thrown down, this ſtatute gives a remedy againſt the adjoining towns, if they do not indict ſuch as are guilty of the fact, *Reg. v. Gruelthorp*, 157
2. But an action will not lie upon this ſtatute before a reaſonable time has been allowed for indicting the offenders, *ib.*
3. According to *Lord Coke* (2. Inſt. 406.) a year and a day ſhould be allowed.
4. No precedent of any leſs time, *ib.*
5. This ſtatute does not extend to every lord (of waſte), but to ſuch only as have a right to approve, 158

VII. THE STATUTE 28. Ed. 1. c. 15.

Articuli ſuper Chartas.

1. Declaratory of the common law, *Silk v. Hill*, 82
2. Requires fifteen days between *the teſte* and the return of all ſummons and attachments, *ib.*

VIII. THE STATUTE of *York*, 12. Ed. 2. c. 5.

Sheriffs.

To ſet their names to their returns, *Rex v. Biſhop of Meath*, 308

IX. THE STATUTE 25. Ed. 3. ſ. 5. c. 2.

Treaſon.

1. Petty treaſon for a ſervant to kill a maſter, 95
2. Extended by equity to a miſtreſs, *ib.*

X. THE STATUTE 1. Rich. 2. c. 12.

Gaolers.

1. Gives an action of escape against the warden of THE FLEET, 95
2. Extended by equity to all gaolers, *ib.*

XI. THE STATUTE 5. Hen. 4. c. 14.

Fines.

To be enrolled, 42

XII. THE STATUTE 23. Hen. 6. c. 10.

Sheriffs.

1. Compellable to take bail, *Kitton v. Fagg*, 288
2. Yet doubted formerly if a sheriff returned a *cepi corpus* (as he must notwithstanding this statute), and had not the body in court at the day of the return, whether he was not liable to an action, *Kitton v. Fagg*, *ib.*
3. But the law now settled that he is not liable, according to a resolution 21. and 22. Car. 2. *ib.*
4. Bonds taken by the sheriff otherwise than for appearance only, void, *Wrench v. Britton*, 327
5. *Where* these bonds for appearance have been held void for defects in the form of the condition; and where not, *Wrench v. Britton*, 327, 328
6. Neither the writ, nor any part of it, need be inserted in the condition of the bond, *Wrench v. Britton*, 328
7. Bond conditioned "*ad respondend' præfat. J. R. de placito transgressionis, &c. ac etiam billæ*," omitting "*ipsius* "*J. R.*" and yet held good, *Wrench v. Britton*, 327, 328

XIII. THE STATUTE 3. Hen. 7. c. 10.

Error.

1. Designed to restrain the abuse of writs of error brought only for delay, *Holroi v. Ebizon*, 275
2. Gives costs and damages to be assessed at the discretion of the justices before whom such writs are sued, *Holroi v. Ebizon*, 274, *&c.*
3. Whether the statute ought to receive a strict or liberal interpretation, *Holroi v. Ebizon*, 275. 277
4. Though the words of the statute are general, yet some cases resolved *out* of it, *Holroi v. Ebizon*, 276, 277
5. Motion for allowing interest by way of damages (from the time of the first judgment) upon writs of error brought into *B. R.* denied, 274, *&c.*

XIV. THE STATUTE 14. and 15. Hen. 8. c. 5.

Physicians.

1. Confirms the charter for incorporating the College of Physicians, *College of Physicians v. Dr. West*, 353
2. Penned in very strong terms, *ib.*
3. What privileges are granted by the charter, see "PHYSICIANS."

XV. THE STATUTE 21. Hen. 8. c. 13.

Pluralities, page 412.

XVI. THE STATUTE 24. Hen. 8. c. 12.

Appeals.

In causes ecclesiastical must be brought within fifteen days after sentence, *Savil v. Kirby*, 386

XVII. THE STATUTE 26. Hen. 8. c. 13.

Treason.

1. Gives entailed lands to the crown in case of treason, which were before preserved to the children, *Thornby v. Fleetwood*, 121
2. Therefore a tenant in tail may be attainted of treason without corruption of blood, *Thornby v. Fleetwood*, 367
3. For corruption of blood would produce a cesser of the estate-tail, 367
4. And by a cesser of the tail, the estate would be taken from the crown and go to the remainder-man, contrary to the meaning of the act, which gives the land to the king, 367

XVIII. THE STATUTE 27. Hen. 8. c. 10.

Statute of Uſes, 423.

XIX. THE STATUTE 27. Hen. 8. c. 24.

Franchiſes.

Several franchiſes reſumed, becauſe derogatory to the prerogative, and tending to the delay of juſtice, *Caſe of Univerſity of Cambridge*, 128, 129

XX. THE STATUTE 32. Hen. 8. c. 1.

Statute of Wills, 423. 425. 469. 532.

XXI. THE STATUTE 33. Hen. 8. c. 9.

Plays.

1. Inflicts a penalty of 40s. *per* day for keeping a gaming-houſe, *Rex v. Dixon*, 336
2. The penalty may be recovered by indictment, though not one of the ways of proceeding directed by the ſtatute, *Rex v. Dixon*, 336, 337

XXII. THE STATUTE 33. Hen. 8. c. 20.

Treaſon.

1. The firſt ſtatute that ever gave leave to try a man in his abſence, *Reg. v. Simpſon*, 341
2. Repealed by implication by ſtatute 1. and 2. P. and M. c. 10. which leaves all trials to the courſe of the common law, *ib.*

XXIII. THE STATUTE 5. and 6. Ed. 6. c. 4.

Striking in the Church-yard.

1. The offender *ipſo facto* excommunicated, *Reg. v. Whitehouſe*, 65
2. Yet a precedent conviction held neceſſary, *Reg. v. Corporation of Buckingham*, 179

XXIV. THE STATUTE 1. and 2. P. and M. c. 10.

Treaſon.

XXV. THE STATUTE 33. Hen. 8. c. 20.

XXVI. THE STATUTE 5. Eliz. c. 4.

Labourers.

1. Gives juſtice of peace power to compel men to ſerve in huſbandry, *Clerk v. Lee*, 263
2. Held by the equity of the ſtatute, that they ſhould likewiſe have power to give ſuch ſervants redreſs as to their wages, though there be no expreſs words in the act to that purpoſe, *ib.*

XXVII. THE STATUTE 5. Eliz. c. 10.

Apprentices.

1. Reſolved *obiter*, that ſerving five years out of *England*, and two in *England*, is enough to ſatisfy the ſtatute, *Reg. v. Morgan*, 70
2. A wife who has lived with her huſband ſeven years, may continue the trade after his death, *ib.*
3. Any perſon that has lived ſeven years with one uſing a trade, though not qualified to do ſo, may ſet up the trade himſelf, as well as if he had lived with one never ſo well qualified, 71

XXVIII. THE STATUTE 23. Eliz. c. 3.

Fines.

1. Deſigned to regulate, not annul fines, *Lord Say and Sele's Caſe*, 43
2. Extends only to fines taken by *Dedimus*, *ib.*
3. The date of the concord to be certified by the Judge before whom the fine was levied, 42
4. Whether the fines declared void by this ſtatute, are any otherwiſe void than as they are voidable by writ of error, 43, 44

XXIX. THE STATUTE 27. Eliz. c. 8.

Error.

Writs of error into the exchequer-chamber given by this ſtatute, *Holroi v. Ebizon*, 275

XXX. THE STATUTE 27. Eliz. c. 12.

Sheriffs.

1. Oaths appointed to be taken by the under-ſheriff, *Kitton v. Fagg*, 288

2. Whether acts done by one that executes the office of under-ſheriff without taking theſe oaths, be valid, *Kitton v. Fagg*, 289, 290

XXXI. THE STATUTE 29. Eliz. c. 4.

Sheriffs.

Of their fees for ſerving execution, *Mitchel v. Reynolds*, 86

XXXII. THE STATUTE 31. Eliz. c. 6.

Simony.

1. A ſimoniacal preſentation void, 176, 177

2. And though inſtitution or even induction follow ſuch preſentation, yet the church may be preſented to without bringing a *quare impedit*, 176, 177. 407

3. For the ſtatute makes all void, in the ſame manner as if the incumbent was naturally dead, 177

4. To an action brought for tithes a ſimoniacal contract is a good defence, *Thornby v. Fleetwood*, 407

XXXIII. THE STATUTE 1. Jac. 1. c. 4.

Papiſts.

1. Of the conſtruction of the ſtatute, 115, &c. 357, &c. 407, &c.

2. The end and deſign of it, and the reaſon why it was made, *Thornby v. Fleetwood*, 406, 407

3. Diſables perſons brought up in Popiſh ſeminaries abroad, in reſpect of themſelves only, but not their heirs, from inheriting or enjoying any lands, &c. during their non-conformity, *Thornby v. Fleetwood*, 115

4. Inflicts penalties upon the officers of the ports that ſuffer them to paſs, and upon the maſter and mariners of the ſhip, *Thornby v. Fleetwood*, 124

5. Whether lands may veſt in Papiſts educated in foreign ſeminaries, notwithſtanding the incapacity incurred by this act, ſo as to enable them to levy a fine, or ſuffer a common recovery, 114, &c. 357, &c. 407, &c.

6. Whether ſuch Papiſts, upon conforming, are only freed from their incapacity for the future; or whether they ſhall then enjoy thoſe eſtates their former incapacity kept from them, 116. 122. 411

7. Whether the crown, or the remainder-man (in caſe of an eſtate-tail and no iſſue) ſhall have the meſne profits till conformity, 120. 123. 409

8. Whether perſons diſabled by this act, may purchaſe for the benefit of their heirs, 121. 363

9. Whether their diſability is removed by a general pardon, 124. 365

10. Whether this act, or any part of it, was repealed by 3. Jac. 1. c. 5. or by 3. Car. 1. c. 2. 118. 122. 356, 357. 409

XXXIV. THE STATUTE 1. Jac. 1. c. 15.

Bankrupts.

1. Explanatory of ſtat. 13. Eliz. c. 7. 244

2. Debts owing to the bankrupt aſſignable to the creditors, *Miles v. Williams*, 164

3. And the ſame remedy given the aſſignees for the recovery of ſuch debts as the bankrupt himſelf had, *Miles v. Williams*, 246

4. Debts due to the wife of the bankrupt before coverture, within the ſtatute, *Miles v. Williams*, 244, 245

5. A deed made in truſt for the advantage of the bankrupt, with deſign to defraud creditors, amounts to an act of bankruptcy, *Cock v. Goodfellow*, 493, 494

XXXV. THE STATUTE 3. Jac. 1. c. 5.

Papiſts.

1. Made upon the occaſion of the gunpowder treaſon, *Thornby v. Fleetwood*, 118

2. De-

2. Deſigned to lay Papiſts under ſeverer penalties than before, 118. 122

3. Reſtrains convicted recuſants from the practice of law, phyſick, &c. 118

4. Supplies ſeveral defects in ſtatute 1. Jac. 1. c. 4. 122

5. Provides againſt ſending children abroad any where; whereas, by 1. Jac. 1. they were only reſtrained from being ſent to Popiſh ſeminaries, 123

6. Gives a penalty to the informer, *ib.*

7. Not ſaid in 1. Jac. 1. who ſhall have the meſne profits of their eſtates, but *here* they are granted to the next of kin, 123. 409

8. This ſtatute likewiſe diſables Popiſh recuſants convict to preſent to any benefices, and veſts the right of preſenting to ſuch benefices in the *chancellor and ſcholars* of the two univerſities reſpectively, 207

9. Whether the univerſity of *Cambridge*, being incorporated by the name of chancellor, *maſters*, and ſcholars, may ſue upon this act by the name of chancellor and ſcholars, 207, 208

XXXVI. THE STATUTE 3. Jac. 1. c. 2.

Papiſts.

1. Takes notice of 1. Jac. 1. c. 4. as an act in force, and that ought to be put in execution, 118. 123, 124

2. Exceeds 1. Jac. 1. and 3. Jac. 1. both in the purview and the penalty, 123

3. Relates to eſtates already veſted, 118

XXXVII. THE STATUTE 3. Jac. 1. c. 8.

Error.

1. Special bail to be put in by plaintiff in error of judgment upon debt, or contract for the payment of money, 281

2. Extends only to caſes where the judgment does neceſſarily import a debt to be due; for otherwiſe, delay not ſo prejudicial, 283

3. What caſes have been adjudged *out* of the ſtatute, *ſee* BAIL IN CIVIL CASES, 10, 11, 12

XXXVIII. THE STATUTE 3. Jac. 1. c. 13.

Killing of Conies.

See ſtat. 22. and 23. Car. 2. c. 25.

1. Relates only to warrens incloſed, *Rex v. Weſton*, 279

2. The ſummary way of proceeding by conviction before juſtices not given by this ſtatute, *ibid.*

XXXIX. THE STATUTE 21. Jac. 1. c. 3.

Monopolies.

Limits the time for which a grant may be made of a new invention to fourteen years, *Mitchel v. Reynolds*, 131

XL. THE STATUTE 21. JAC. 1. c. 16.

Statute of Limitations.

1. Not to be taken advantage of formerly, unleſs it was pleaded; but now the law is otherwiſe, *Stafford v. Forcer*, 313

2. A bare acknowledgment of a debt will not amount to a new promiſe ſufficient to prevent the operation of the ſtatute, 314

3. But "*I deny that I owe you any thing*; "*prove it, and I will pay you*," held ſufficient, *ib.*

4. If this ſtatute be pleaded to an *aſſumpſit* brought by an executor on a promiſe to the teſtator, no new promiſe to the executor can avoid the plea, 313, 314

5. Actions of *aſſumpſit* not mentioned in the ſaving clauſe, *Aubrey v. Forteſcue*, 206

6. The ſaving clauſe not to be extended by equity, *ib.*

7. *Where* held, that the ſhutting up of the courts *tempore guerræ*, would not avoid the ſtatute, *ib.*

XLI. THE STATUTE 13. Car. 2. ſ. 2. c. 1.

Qualification Act.

1. Corporation officers to receive the ſacrament within a year before their election,

election, *Reg. v. Aldborough*, 100. 173

2. Whether the offices of ſuch as are not ſo qualified be *void*, or only *voidable*, 65. 100. 179

3. How the word *placed* may be interpreted in this ſtatute, *Reg. v. Buckingham*, 177

4. *See* alſo *Reg. v. Whitehorn*, 66, *notis*

XLII. THE STATUTE 13. Car. 2. c. 2.

Proceſs.

1. *Where* after iſſue joined, and *any* judgment had, there ſhall not need to be fifteen days between the *teſte* and the return of the writ, *Silk v. Hill*, 82

2. Of the conſtruction of the ſtatute, *ib.*

XLIII. THE STATUTE 13. and 14. Car. 2. c. 12.

Poor.

1. Any perſon becoming chargeable may be removed to the laſt *pariſh* where he was legally ſettled, *Reg. v. Doughton*, 81

2. But not to an extra-parochial place where there are no officers to receive him, *ib.*

3. Nor to the pariſh where he lived before removing to the extra-parochial place, becauſe not his *laſt* ſettlement, *ib.*

4. Any poor perſon coming to ſettle on a tenement under the value of 10l. *per ann.* removeable by two juſtices within forty days after ſuch coming, *Rex v. Beaucleer*, 431

5. A tenement of 10l. *per ann.* will entitle to a ſettlement where the houſe is, though part of the land ſhould lie in a different pariſh, 389

6. For the law preſumes, that it is not probable that one ſhould become chargeable, who has credit enough to get intruſted with the management of a farm of ſuch value, *ib.*

7. If a man takes ſeveral diſtinct tenements in different pariſhes, that in the whole amount to more than 10l. *per ann.* yet he gains no ſettlement, if each of them ſingly is under that value, *Sydenham v. Lamerton*, 390

8. But perſons coming to reſide upon their own lands, though but 20s. *per ann.* not removeable, *Rex v. Beaucleer*, 431

XLIV. THE STATUTE 22. & 23. Car. 2. c. 10.

Statute of Diſtributions.

1. A *feme covert* may ſue ſingly upon this act in the ſpiritual court, *Daeth v. Baux*, 63

2. The huſband may releaſe his wife's ſhare of an inteſtate's eſtate, *ib.*

3. But if it be not releaſed by him, it is ſo much the wife's that ſhe ſhall have it by ſurvivorſhip, 64

4. A rule has obtained in equity, that the *reſiduum* of a teſtator's eſtate not diſpoſed of by his will, ſhall be divided according to this ſtatute, *Lord Lanſdowne's Caſe*, 99

XLV. THE STATUTE 22. & 23. Car. 2. c. 25.

Killing of Conies.

1. Extends to all warrens incloſed or not incloſed; for the words *though not incloſed* are not reſtrictive, *Rex v. Weſton*, 280

2. Gives the ſhort way of conviction before juſtices, *ib.*

XLVI. THE STATUTE 29. Car. 2. c. 3.

Statute of Frauds and Perjuries.

1. Whether the ſigning of three witneſſes at three ſeveral times, in the preſence of the teſtator, be a good execution of a will within this ſtatute, *Cook v. Parſons*, 15

2. (*N. B.* It has been held good, ſee *Rep. of Caſes in Equity*, 259, *&c.*)

3. The time when any judgment is given muſt be marked on the roll, *Taylor v. Mathews*, 325

4. And though the judgment, by being entered without continuances, may have relation to a preceding term, yet it ſhall not bind land, but from the day ſo marked, 325

5. If

5. If this ſtatute be not inſiſted on, chancery will compel the performance of an agreement, though not in writing, *Nab v. Nab*, 404

6. Not neceſſary that truſts relating to perſonal eſtate ſhould be in writing, 405

XLVII. THE STATUTE 31. Car. 2. c. 2.

Habeas Corpus Act.

1. Perſons committed by *warrant* for treaſon or felony, to be bailed, if not indicted the next Term or ſeſſions after their commitment, provided they enter their prayer the firſt week of the Term, or firſt day of the ſeſſions, to be brought to trial, *Rex v. Leonard*, 429

2. Reſolved, that ſuch perſons as ſtand committed by *rule of court*, are not intitled to claim the benefit of this act, *ib.*

XLVIII. THE STATUTE 1. Jac. 2. c. 17.

Poor.

1. Notice in writing of coming to live in a pariſh, neceſſary to a ſettlement, *St. Mary v. St. Lawrence*, 14

2. But payment of taxes or exerciſing offices, upon the equity of the act, judged equivalent to notice in writing, *ib.*

XLIX. THE STATUTE 1. Will. & Mary, ſ. 1. c. 26.

Papiſts.

1. Record of the default a conviction of itſelf, *Vavaſor v. Crofts*, 209

2. So that in pleading a conviction upon this ſtatute, the ſpecial concluſion of *ideo convictus eſt*, need not be uſed, *ib.*

L. THE STATUTE 2. Will. & Mary, ſ. 1. c. 5.

Diſtreſſes.

1. Goods diſtrained for rent may be ſold after notice left of the diſtreſs with the cauſe thereof, *Potter v. Pinkney*, 265, 266

2. Notice to the leſſee ſufficient; for the owner of the goods may not be known, 266

3. In what manner the notice ought to be pleaded, in a juſtification under the ſtatute, *ib.*

LI. THE STATUTE 3. and 4. Will. & Mary, c. 10.

Deer-ſtealers.

1. Exceptions taken to a conviction upon this ſtatute, *Reg. v. Simpſon*, 248

2. The conviction may be taken either by the juſtices of the county where the fact is committed, or of *that* where the party is apprehended, *Reg. v. Simpſon*, 342

3. No particular form of proceeding preſcribed, 249. 378

4. Only that the conviction be by oath of one credible witneſs, *Reg. v. Simpſon*, 378

5. Agreeable to the courſe of the common law, that the party ſhould be ſummoned, 250

6. Whether the ſummons need be a perſonal ſummons, 342. 345

7. If the party do not appear upon ſummons, the juſtice may proceed to conviction in his abſence, 250. 341, &c. 378, &c.

8. But a juſtice has no power to iſſue his warrant to compel the appearance of the party, 345. 381

9. Yet after conviction, the conſtable or other officer, or proſecutor himſelf has power to detain the offender (in caſe he be preſent) for fear of eſcape, 342

10. For want of ſufficient diſtreſs, the puniſhment by this ſtatute is pillory and a year's impriſonment, 341

11. Judgment of the juſtices final, *ib.*

LII. THE STATUTE 3. and 4. Will. & Mary, c. 11.

Poor.

1. Of the reaſon and deſign of the ſtatute, *St. Mary Reading v. St. Lawrence*, 14, 15

2. Settlement gained by executing any public annual office, 14

3. Or by payment of taxes, 11. 14

4. But payment of a ſcavenger's rate, being a ward rate, adjudged no ſettlement, 14

5. And yet executing the office of a ſcavenger would have been a ſettlement; *per* EYRE, 15

6. The warden of a borough intitled to a ſettlement in the pariſh where he lives during the exerciſe of his office, though not choſen by the pariſh, 13, &c.

7. Hiring for a year and ſervice accordingly make a ſettlement, 15

8. And though a perſon hired for a year ſhould not ſerve out the whole time; yet if he has ſerved as long before ſuch hiring as to make up a year's ſervice in the whole, it has been adjudged ſufficient to ſatisfy the meaning as well as the words of the act, *South Sydenham v. Lamerton*, 390

9. For one that is hired for a year's ſervice is preſumed to be of ſufficient ſtrength to maintain himſelf by his bodily labour, and conſequently a perſon not likely to become chargeable, 15. 390

III. THE STATUTE 3. and 4. Will. & Mary, c. 14.

Frauds.

1. In debt upon bond the heir may plead *riens per diſcent*; and if it be found for the plaintiff, the jury ſhall then inquire of the value of the lands deſcended, *Jeffry v. Barrow*, 18

2. Whether the inquiſition may be taken by any other jury beſides *that* which tried the cauſe, 19

3. Whether a verdict that found the deſcent of ſufficient lands to diſcharge the debt, ſhould be deemed equivalent to an inquiſition, *ib.*

4. Or whether the verdict was void for uncertainty, becauſe it did not appear whether the jury meant the legal or the equitable debt, 18, 19

5. The end deſigned by the act was to help the creditor in caſe of alienation, 19

6. And alſo the heir, by enabling him to plead *riens per diſcent* without the riſk of becoming liable to the payment of the whole debt, in caſe ever ſo little was found to deſcend, 19

LIV. THE STATUTE 5. and 6. Will. & Mary, c. 11.

Certiorari.

1. Deſigned to diſcountenance the removing of ſuits by *certiorari*, *Reg. v. Muſcott*, 194

2. If an indictment be removed by *certiorari* from the ſeſſions into *B. R.* the proſecutor ſhall have coſts upon the conviction of the defendant, 193

3. Notwithſtanding which, the proſecutor ſhall be allowed to be an evidence; becauſe otherwiſe the removing of ſuits would be encouraged, and the intention of the act defeated, 194

LV. THE STATUTE 5. and 6. Will. & Mary, c. 2.

Coaches.

Uſual with the commiſſioners of hackney coaches to convict upon this act without appearance, after a ſummons, *Reg. v. Simpſon*, 344

LVI. THE STATUTE 8. and 9. Will. 3. c. 27.

Gaolers.

1. Gives an action of eſcape againſt the marſhal of the king's bench, or the warden of the Fleet, if they or their deputies refuſe to produce a priſoner after a day's notice, *Parks v. Crawford*, 394

2. If no particular time of day be ſpecified in the notice, the priſoner need not be produced till the cloſe of the evening, *Parks v. Crawford*, 396, 397

3. Inferior officers of the priſon not comprehended under the word *deputy*, *ib.*

LVII. THE STATUTE 9. and 10. Will. 3. c. 11.

Poor.

1. Reaſon of making the act, *Rex v. Beaucleer*, 430, 431

2. No

2. No certificate-man to gain a ſettlement, unleſs he take a tenement of 10l. *per ann.* or execute ſome annual office, *Rex v. Beaucleer*, 430

3. Held notwithſtanding, that a certificate-man was ſettled by the deſcent of a copyhold upon his wife, though but 20s. *per ann.* *ib.*

LVIII. THE STATUTE 9. & 10. Will. 3. c. 15.

Arbitration.

1. Submiſſion to arbitration, to be made a rule of court, if the parties agree to have it ſo, *Clarke v. Elwick*, 332

2. Affidavit to be made by a witneſs of the arbitration-bond, that ſuch agreement was inſerted in the condition of it, *Clarke v. Elwick*, *ib.*

3. If a witneſs refuſes to make the affidavit, the Court will compel him to it, rather than the ſtatute ſhould be eluded, *Clarke v. Elwick*, 332, 333

4. The party may at pleaſure reſort to this new remedy given by the ſtatute, even after judgment recovered upon the arbitration-bond, 333

LIX. THE STATUTE 11. & 12. Will. 3. c. 4.

Papiſts.

1. Diſables papiſts (not conforming at 18) to take lands either by deſcent or purchaſe, 89, 90. 482

2. *Purchaſe* includes deviſe, 95. 234. 242. 483. 537

3. The ſurplus of lands deviſed to be ſold for payment of debts and legacies, is a real intereſt within this act, 93. 234. 483. 537

4. And ſo are all "*profits out of lands*" ariſing from ſale, as well as continuing profits, *Ratcliffe v. Roper*, 96

5. So that papiſts are diſabled by this act, from charging their lands with portions for younger children of their own perſuaſion, *Ratcliffe v. Roper*, 91. 94

6. Whether their lands may be deviſed to be ſold for the payment of debts owing to popiſh creditors, *Roper v. Ratcliffe* 236

7. Whether papiſts that conform at 18, are capable of taking whatever lands were deviſed to them before they came to that age, *Hill v. Filkin*, 481, &c. 536, &c.

8. See different interpretations of the act by *Lord Chancellor* MACCLESFIELD and *Lord Chancellor* KING, 485. 537

LX. THE STATUTE 1. Ann. c. 8.

King and Queen.

1. Original writs not to abate upon the demiſe of the crown, *Reg. v. Aires*, 258

2. Extends to a *ſcire facias* brought for the repeal of a patent, *Reg. v. Aires*, 355

LXI. THE STATUTE 3. and 4. Ann. c. 9.

Bills, or Promiſſory Notes.

1. Promiſſory notes payable to *A.* or order, transferable by indorſement, *Joſſelyn v. L'Acier*, 316

2. The indorſee may maintain an action, as *A.* might have done before indorſement, *ib.*

LXII. THE STATUTE 4. and 5. Ann. c. 16.

Amendment of the Law.

1. Enables the defendant in debt upon bond to plead payment, or to bring the money into court; but not to plead tender, refuſal, *et uncore priſt*, *Player v. Bandy*, 26

2. Such faults in form as would be cured by verdict, helped upon a general demurrer, *Cole v. Hawkins*, 252

3. The defendant in any action, with leave of court, may plead ſeveral pleas, *Haiton v. Jefferies*, 280

4. But the Court may not give him leave to *plead* and *demur*, 280, 281

5. Whether this extends to a defendant in error, *Herſon v. Aglionby*, 326

6. Writ of error ſhall not abate by the death of one of the plaintiffs in error, 326

7. Bail bonds aſſignable under the hand and ſeal of the ſheriff, *Kitton v. Fagg*, 289

8. Whether this circumſtance of the hand and ſeal makes the aſſignment a perſonal act in the ſheriff, and ſuch as cannot be performed by the under-ſheriff, *Kitton v. Fagg*, 289. 291

9. Whether the under-ſheriff, though not particularly mentioned, be not included under thoſe words of the act, "*or other* "*officer taking bail*," *Kitton v. Fagg*, 288

LXIII. THE STATUTE 4. and 5. Ann. c. 17.

Bankrupts.

1. Diſcharges bankrupts, upon their conforming themſelves to the ſtatutes in that caſe provided, from all debts owing at the time of bankruptcy, *Miles v. Williams*, 160

2. Debts contracted by the wife *dum ſola*, diſcharged by the bankruptcy of the huſband, *Miles v. Williams*, 160, &c. 243, &c.

3. But an executor or adminiſtrator is not diſcharged from the debts he owes as executor, &c. *Miles v. Williams*, 161. 245

4. Bankrupts obliged to make a diſcovery of their eſtates upon oath, under the pain of felony, 164. 246

LXIV. THE STATUTE 5. Ann. c. 14.

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1. A perſon authoriſed by a lord of a manor to kill game for his uſe, a qualification within this ſtatute, *Reg. v. Mathews*, 26

2. The offence in this ſtatute is the keeping of dogs, engines, &c. 27

3. But *one* five pounds can be forfeited in the ſame name, *ib.*

LXV. THE STATUTE 7. Ann. c. 12.

Ambaſſadors.

1. Declares the proceedings againſt the *Muſcovite Ambaſſador* upon an arreſt for debt null and void, 5

2. Settles the privileges of Ambaſſadors in reſpect of debt, *ib.*

LXVI. THE STATUTE 8. Ann. c. 18.

Aſſize of Bread.

1. Whether a juſtice of peace may proceed upon default, *Reg v. Green*, 213

2. Whether the three days allowed for information ought to be computed incluſively or excluſively, *Reg. v. Green*, 212

3. A conviction upon this ſtatute quaſhed for want of certainty in the charge, *Rex v. Bradley*, 155

4. Another conviction quaſhed by reaſon the evidence was not otherwiſe ſet forth than that the witneſs was ſworn *de veritate præmiſſorum*, *Reg. v. Green*, 213

LXVII. THE STATUTE 9. Ann. c. 20.

Mandamus's.

1. Speeds the proceedings upon *mandamus's*; but does not give any new *mandamus* in caſes where none would lie before, *Reg. v Heathcote*, 54

2. The returns to *mandamus's* to be kept to the ſame ſtrictneſs as before, *Reg. v. Mayor of Pomfret*, 108

3. A ſpecial proviſion in the act to ſecure men from double vexation, 55

LXVIII. THE STATUTE 10. Ann. c. 5.

Bankrupts.

1. A declaratory law, *Miles v. Williams*, 246

2. It appears from this ſtatute, that a debt due from the bankrupt and another is within ſtat. 4. and 5. Ann. c. 17. *ib.*

LXIX. THE STATUTE 12. Ann. ſ. 1. c. 18.

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If the maſter be a certificate-man, the ſervant can gain no ſettlement, unleſs his

his maſter does, *Rex v. Bury Pomroi*, 279

LXX. THE STATUTE 9. Geo. 1. c. 7.

Settlement.

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LXXI. THE STATUTE 11. Geo. 1. c. 4.

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LXXII. THE STATUTE 11. Geo. 1. c. 18.

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LXXIII. THE STATUTE 20. Geo. 2. c. 19.

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In what caſes the juſtices have juriſdiction, 68, *notis*

LXXIV. THE STATUTE 31. Geo. 2, c. 11.

Servants.

Juriſdiction of the juſtices, 68, *notis*

LXXV. THE STATUTE 6. Geo. 3. c. 25.

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In what caſes the juſtices have juriſdiction, 68, *notis*

LXXVI. THE STATUTE 18. Geo. 3. c. 60.

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3. Deviſe to *J. S.* and the heir of his body, paſſes an eſtate-tail, *Woodright v. Wright*, 374, 375
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8. An eſtate-tail upon failure of iſſue reverts to the donor and his heirs, *Thornby v. Fleetwood*, 411

9. Remainder can never take place but upon the ceſſer of the eſtate-tail, 120. 366. 414, 415

10. If huſband and wife be tenants in ſpecial tail, and the huſband only levies a fine and dies, and the wife enters, ſhe becomes tenant in tail again; though the entail cannot deſcend, becauſe the iſſue is barred by the father's fine, *Thornby v. Fleetwood*, 412, 413

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TERM OF YEARS.

A term will begin ſometimes in equity, before it does in law, *Butler v. Duncomb*, 435

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TITLE.

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TRADE.

1. Bond conditioned to forbear the exerciſe of a trade, during a certain time, and in a certain place, adjudged good, 27. 85. 130

2. But if it do not appear in the condition of the bond to have been entered into upon a juſt and valuable conſideration, it will be void, *Mitchel v. Reynolds*, 130. 136

3. So likewiſe if the breach of the condition does not apparently tend to the damage of the obligee, the reſtraint is void, *Mitchel v. Reynolds*; 133. 135

4. Or if it be a general reſtraint, 28. 131, 132

5. Yet a perpetual reſtraint in a particular place may be good, 132. 135

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8. Of reſtraints upon trade by by-laws, *ſee* BY-LAWS.

9. Of reſtraints by cuſtoms, ſee CUSTOM.

10. Maſter of a ſhip dies in a trading voyage, and his ſucceſſor trades with his effects: Decreed the ſucceſſor ſhould be conſidered as a truſtee, and account for the profit, with reaſonable deductions for labour and ſkill, *Brown v. Litton*, 20

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13. A power to place out children's fortunes to intereſt, *or other way of improvement*, muſt be underſtood excluſive of trade, *Cock v. Goodfellow*, 495

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3. Where the king may take iſſue upon the defendant's traverſe, *Reg. v. Blagden*, 297, 298

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1. A poſſeſſory right only, without property, ſufficient to maintain an action of treſpaſs, *Templeman v. Croſs*, 25. 37

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3. Treſpaſs is a formed action, 140

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5. Though there be no fence, yet the declaration muſt be *clauſum fregit*, for every man's ground is fenced in the eye of the law, *ibid.*

6. Death of one defendant will not abate the action, unleſs it be pleaded that he died *ante impetrationem brevis*, *Pollard's Caſe* cited, 251

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2. Grantable as well for a fault in the Judge as jury, in cauſes tried at *niſi prius*, *Reg. v. Helſton*, 202, 203

3. But not for the miſtake of Counſel, though the cauſe was loſt for want of their inſiſting upon a material point of law, when ſtirred, *ibid.*

4. Yet *Lord Chief Juſtice* PARKER thought, if the party had no other remedy, a new trial ought to be granted; unleſs when the point is not only not inſiſted upon, but expreſsly waved by the Counſel, *ibid.*

5. A bill of exceptions prayed at a trial at bar, *Lord Say and Sele's Caſe*, 48

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1. As ſure a remedy for a breach of truſt in chancery, as for any legal right in court of law, *Roper v. Ratcliffe*, 234. 235

2. If a truſtee is impowered to put money out to intereſt, he is accountable for intereſt, though he ſhould let it lie by him, and make none, *Brown v. Litton*, 21

3. If an eſtate is deviſed to truſtees to be ſold, yet the truſtees are not obliged to ſell it, notwithſtanding the poſitive directions of the teſtator, as long as *ceſtui que truſt* is ſatisfied without it, *Roper v. Ratcliffe*, 235. 237

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5. *A.* buys 990l. *South-Sea* ſtock, and gets it transferred to *B.* Some time after *B.* mortgages 1000l. then ſtock to the Company, and ſells out all the reſt that he had remaining in his name, excepting only 500l. The ſtock riſing, *A.* deſires to have the truſt-ſtock transferred to him. *B.* transfers 500l. and promiſes

promiſes to be accountable for the reſt. Upon the fall of the ſtock, *A.* brings his bill for the value of the ſtock when truſt-ſtock ſold by the defendant, or at the time the transfer was requeſted. Decreed the defendant ſhould be deemed not to have ſold, but mortgaged the truſt-ſtock; and that he was accountable to the plaintiff only for ſtock and dividends.—*Note*, *A.* never ſold the 500l. that was transferred, *Le Croy v. Eaſtman*, 498, *&c.*

6. What truſts ſhall be deemed void and fraudulent *quoad* creditors; and what not, 247. 489, *&c.*

7. If a man articles to ſell lands, and recovers damages againſt the vendee for non-performance of his contract; whether by this recovery at law the vender ſhall ceaſe to be a truſtee in equity for the vendee, *Lewis v. Lechmere*, 506

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1. Writs of error directed to "*Thom. Dom. Trevor*," quaſhed, becauſe the return was by "*Thom. Trevor Mil*," *Nutton v. Crow*, 283. 285

2. Record deſcribed in the writ of error was of a treſpaſs committed by thirty-one perſons, the record returned was of a treſpaſs by thirty-two, and held no variance. 368, 369

3. That ſhall not be variance, which may be helped by any conſtruction the rules of language will admit of, *Cook v. Hamilton*, 368

VENIRE FACIAS ET VISNE.

1. If the *venire* is made returnable upon a day certain, when it ought to have been returnable upon one of the common return days, it is a diſcontinuance, and not helped by ſtatute where the king is party, *Rex v. Biſhop of Meath*, 310

2. A new *venire* ſhall be awarded when the entry to the firſt is *vicecomes non miſit breve*, *ibid.*

VERDICT.

1. The Court will make any intendment to ſupport a verdict, rather than it ſhould be void, *Muſton v. Yateman*, 301

2. Improper words aided by verdict, *Jackſon v. Laveright*, 185

3. If the iſſue be material, defects in pleading cured by verdict, *Muſton v. Yateman*, 230

4. A defective declaration may be helped by verdict, *Parker v. Langley*, 145. 210

5. Becauſe it is to be ſuppoſed that the verdict could not have been found, unleſs there had been evidence given at the trial of that matter wherein the pleading was defective, *Muſton v. Yateman*, 229, 300

6. As where a grant of a thing is alledged, which in its own nature could not be granted otherwiſe than by deed, if the jury find the grant, it muſt be ſuppoſed evidence was given ſufficient to prove the deed, *Muſton v. Yateman*, 301

7. Where bad and defective pleadings were not aided by verdict, *ib.*

8. Where variance between the writ and the count was not helped by a verdict, *Stafford v. Beneath*, 69, 70

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1. All miniſterial acts done by the under-ſheriff, of the ſame authority as if done by the ſheriff himſelf, *Kitton v. Fagg*, 288

2. If a ſtatute appoints an act to be done by the ſheriff, and preſcribes no particular manner for the doing it that makes it neceſſary to be a perſonal act, it may be performed by the under-ſheriff, though he be not mentioned in the ſtatute, *Kitton v. Fagg*, 290

3. An under-ſheriff, though not named, is included in ſeveral acts of parliament, by virtue of his office, *Kitton v. Fagg*, 289

UNIVERSITIES.

1. Vice-chancellor of *Cambridge* may claim conuſance of the pleas where any members of the univerſity are defendants, by virtue of a charter granted by queen *Elizabeth*, *Caſe of Univerſity of Cambridge*, 126

2. This charter, being confirmed by act of parliament, gives power to proceed *ſecundum legem et conſuetudinem univerſitatis*, *ibid.*

3. Claim of conuſance too late after imparlance, notwithſtanding the excluſive words of the charter, *Caſe of Univerſity of Cambridge*, 129, 130

USE, OR USES.

1. Where a covenant to ſtand ſeiſed to the uſes declared in marriage articles, was decreed to be no conveyance, *Trevor v. Trevor*, 436, &c.

2. In caſe of a conveyance by way of uſe upon condition of the payment of ſuch a ſum at ſuch a day, the heir may pay the money if the anceſtor die before the day, *Marks v. Marks*, 421. 424

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Where an uſurious contract was held good in favour of an innocent perſon, *Turton v. Benſon*, 449

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1. Commitment by rule of court, no commitment by warrant within the *habeas corpus* act, *Rex v. Leonard*, 429

2. The ſpecies of treaſon need not be expreſſed in the warrant, becauſe proceſs the ſame in one ſort of treaſon as in another, *Harvey of Comb's Caſe*, 334

WARRANTY.

1. A collateral warranty was one of the harſheſt and moſt cruel points of the common law, *Bath v. Sherwin*, 3, 4

2. Warranty, in the nature of it, imports as well warranty of the property as poſſeſſion, *Hacket v. Glover*, 143

3. Covenant may be brought upon it without ſhewing any eviction, 142

WILLS.

1. Nuncupative wills to be put in writing within ſix days after their making, *Nab v. Nab*, 405

2. Before the ſtatute of Frauds, not neceſſary for a will to be under the hand of the teſtator; ſufficient by ſtat. 32. *Hen.* 8. if reduced to writing by his direction, *Coventry v. Coventry*, 469

3. The ſame will is often proved in both courts, *viz.* temporal and ſpiritual, *Savil v. Kirby*, 386

4. Becauſe proof in the one court eſtabliſhes it for lands, the other for chattels only, *ib.*

5. In the interpretation of wills, the intention of the teſtator ought to be ſupported as much as poſſible, *Gore v. Gore*, 502. 523

6. And Judges have been commended for being *aſtuti* in finding out ways to do ſo conſiſtent with the rules of law, *Gore v. Gore*, 502

7. Great latitude of conſtruction to be allowed in the words of a will, *Marks v. Marks*, 420. 523

8. Becauſe the law ſuppoſes it to be made when a man is *inops conſilii*, *Marks v. Marks*, 422, 423

9. If the intention of the teſtator be plain, an eſtate in fee or in tail ſhall paſs by ſuch words in a will as would not have been ſufficient to have conveyed thoſe eſtates by deed, *Lord Say and Sele's Caſe*, 46

10. See alſo 523

11. If a will refers to any writing, it is as well as if the writing was inſerted *verbatim*, *Lord Lanſdowne's Caſe*, 99

12. How

12. How far parol proof may be admitted to explain a will, 99, 109

13. One adds a codicil to his will with theſe words, "I do hereby revoke that "part of my will wherein I make *A.* "*B.* and *C.* three of my truſtees:" Decreed, that no part of the will was revoked, but barely the names of thoſe three truſtees, *Atcherley v. Vernon*, 520, &c.

14. Where a will cancelled upon a falſe ſuppoſition, was ſet up again in equity, *Coventry v. Coventry*, 467

15. The doctrine of the republication of wills, 96, &c.

16. The making a codicil, *quatenus* a codicil, will not amount to a new publication, *Lord Lanſdowne's Caſe*, 98

17. Nor the inſerting a new legacy, or another executor; and this before the ſtatute of Frauds, 97

18. Whether a parol declaration would amount to a new publication before that ſtatute? 98

19. Whether the ſame forms be not neceſſary now, ſince that ſtatute, to the republiſhing of a will, as to the firſt making? *ib.*

20. A will ſtood revoked as to the real, but not the perſonal eſtate; when the teſtator (having ſaid the day before he deſigned to republiſh his will) brings his will in one hand and a codicil in the other, and ſays, "This is "my will, and this I deſign as a co-"dicil to my will;" and then the codicil was duly executed according to the ſtatute of Frauds and Perjuries; whether this amounts to a republication, the will itſelf being neither read nor executed as the ſtatute requires? 96, &c.

WITNESSES.

1. It is a principle of the common law, that evidence ſhall be given by perſons diſintereſted, *Reg. v. Muſcot*, 193

2. Yet in ſome criminal caſes intereſted perſons are allowed to be witneſſes by reaſon of neceſſity, *Reg. v. Muſcot*, 193, 194

3. They who produce a witneſs may examine him in chief only; but the party againſt whom he is produced, may examine him upon a *voir dire*, whether he be concerned in intereſt, *Caſe of the Corporation of Bewdley*, 151

4. But in caſe other evidence be offered to prove him intereſted, then the witneſs himſelf ſhall not be examined upon a *voir dire*, *Reg. v. Muſcot*, 193

5. No one ſhall be allowed to give evidence about any matter in favour of the hundred to which he belongs, *Reg. v. Hornſey*, 150

6. The ſame, though he be ſo poor at preſent as to pay no taxes, for he may hope to become rich, *ib.*

7. Though a witneſs is not immediately concerned in the event of a cauſe, yet if he be any way intereſted in the queſtion upon which the cauſe depends, it is a ſufficient objection to his evidence, *Reeves v. Symonds*, 292

8. As where an action is brought by a commoner, for his right of commoning, no perſon that claims a right of common upon the ſame title may be allowed for a witneſs, *ib.*

9. So when an action was brought againſt *A.* for a quantity of ſtockings, and *A.* pleaded, that it was not he but *B.* who bought them, and ſent them to *France* in the way of trade, *B.* was not permitted to ſwear himſelf to be the buyer, becauſe upon that queſtion depended the right to the profit which had been made of the ſtockings, *Reeves v. Symonds*, 291, 292

10. A witneſs being brought to eſtabliſh a charter, his evidence was objected to by reaſon of his being a mortgagee under the corporation, as was inferred from an anſwer of his to a bill in chancery; but this anſwer being ambiguous, the Court was of opinion he ſhould be admitted to explain his anſwer, *Reg. v. Bewdley*, 151

11. The evidence of bawds is rejected in all caſes by the ſpiritual court, as infamous perſons, *Savil v. Kirby*, 385

12. Whoever ſubſcribes his name as a witneſs to any thing, does thereby undertake

dertake to give his evidence when it ſhall be wanted, and if he refuſes, the Court will compel him to it, *Clark v. Elwick*, 333

WORDS ACTIONABLE AT LAW, OR NOT.

1. Actions for words of no great antiquity, *Harriſon v. Thornborough*, 197
2. Precedents in this kind of actions, not of the ſame authority as in other actions, becauſe words alter their ſignification, *ib.*
3. Theſe actions were at firſt ſo far diſcountenanced, as that whenever the words were capable of two conſtructions, the Court always took them *mitiori ſenſu*, *ib.*
4. But the rule that now prevails is to take them in the moſt natural ſenſe, and as they muſt have been underſtood by the perſons to whom they were ſpoken, 198
5. The reaſon of this different practice now and formerly, 197, 198
6. No action lies for ſuch ſort of words as "whore," "bawd," &c, *Savil v. Kirby*, 385
7. Words that hurt the credit of tradeſmen are actionable, *Arnie v. Johnſton*, 111
8. "You are a ſoldier, I ſaw you in your "red coat doing duty, your word is "not to be taken," ſpoken of an upholſterer, held actionable; becauſe implying a deſign to defraud his creditors, by reaſon that a ſoldier is a privileged perſon, *ib.*
9. "Two dyers are gone off, and, for "aught I know, *H.* will do ſo too "within this time twelvemonth," actionable, *Harriſon v. Thornborough*, 196, &c.
10. Where an action was brought for theſe words, "broken," "run away," "and will never return again," and the Court divided, 197
11. "*H.* got a witneſs to forſwear him"ſelf in ſuch a cauſe; you or he hired "one *B.* to forſwear himſelf," actionable, even if *B.* did not forſwear himſelf, 196, &c.
12. If one ſay "*A.* or *B.* did, &c." either *A.* or *B.* may bring an action, with an averment that neither of them did, &c. 198

WORDS SUABLE IN THE SPIRITUAL COURT, OR NOT.

1. "You are a whore," or "You are a "bawd," are words puniſhable in the ſpiritual court, *Savil v. Kirby*, 385
2. But "You keep a bawdy houſe," not ſuable there, becauſe puniſhable by indictment, *ib.*

WORDS INDICTABLE, OR NOT.

1. Words not indictable, unleſs they have a direct and immediate tendency (and not by conſtruction or implication) to a breach of the peace, *Reg. v. Langley* cited, 186
2. Calling a juſtice of peace (in his abſence) "aſs, fool, and coxcomb, for "making ſuch a warrant," held not indictable, *Reg. v. Wrightſon* cited, *ib.*
3. Saying of a juſtice of peace, "that "he would judge in any cauſe brought "before him according to his affec"tion," held not indictable, *Reg. v. Soley* cited, 187
4. Saying of a juſtice of peace, "He de"ſerves to be hanged for making ſuch "a numſcull order," held not indictable, *Reg. v. Lycaſell*, *ib.*
5. Laying his hand upon his ſword, and ſaying, "If it was not aſſize-time, I "would not take ſuch language from "you," held no aſſault, *Tuberville v. Savage*, cited, *ib.*
6. One was indicted for ſaying to juſtices at their ſeſſions, when brought before them by warrant, "This is no juſtice "of peace's buſineſs, you ſhall not try "this matter: have a care what you "do, I have blood in me: if I had "you in another place!" judgment arreſted, becauſe the words were not indictable, as not carrying with them any neceſſary intendment of a challenge or intent to break the peace, eſpecially when ſpoken by a wheelwright, *Reg. v. Nun*, 186, 187

7. Where theſe words, "You lie, and I "will maintain it with my life," written in a letter to a lord, were held finable in the Star-chamber, *Lord Darcy's Caſe* cited, 187

WRITS.

1. Judicial writs, what, *Reg. v. Aires*, 259

2. Defects in form may abate original, but not judicial writs, *Shuttleworth v. Patterſon*, 279

3. If judicial writs iſſue out that are not warranted by the record, they muſt be quaſhed, *Weddal v. Jocar*, 306

4. Death of the plaintiff abates the writ or ſuit, *Reg. v. Aires*, 258

5. By the common law, no difference in this reſpect between the kin, and the ſubject, *ib.*

6. But by the ſtatute 1. Ann. c. 8. no original writ will abate upon the demiſe of the crown, *ib.*

7. Formerly a writ of error would have abated by the death of one of the plaintiffs in error, *Herſon v. Aglionby*, 326

8. But ſince ſtat. 4. & 5. Ann. the law is adjudged to be otherwiſe, *ib.*

9. Writ of error muſt be directed to the Chief Juſtice by his natural name, and not by his name of office; and the reaſon why, *Nutton v. Crow*, 283, 284

10. Writ of error directed to "*Thom. "Flemming, Capital' Juſtic' ad pla-"cita*," quaſhed, becauſe *coram nobis tenend. aſſignat'* omitted, *Heydon v. Godſalve* cited, 285

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13. Exception taken to the writ in an appeal of murder, that the "*s*" in the word "*appellat*" was turned up, *Wiadrington v. Charlton*, 86

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